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A DIGEST
OF THE LAW OF
BILLS OF EXCHANGE.

A DIGEST
OF THE LAW OF
BILLS OF EXCHANGE,
PROMISSORY NOTES AND CHEQUES.

BY
M. D. CHALMERS, M.A.,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

SECOND EDITION.



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PREFACE

TO SECOND EDITION.

IN this edition I have added the cases which have been decided since the first edition was published. I have also added a chapter on Securities for Bills of Exchange. The new chapter deals with, among other things, the much disputed doctrine of *Ex parte Waring*. I have also added to the Appendix of Statutes, and have inserted in the body of the book the provisions of the Crossed Cheques Act, 1876, in their entirety, instead of paraphrasing and shortening them as was done in the first edition. A full Table of Contents has also been added.

Many of the articles have been re-drafted. Several of the re-drafted articles I have taken from clauses in the Bills of Exchange Bill, 1881, which I drafted under instructions from the Institute of Bankers. The Bill was introduced by Sir John Lubbock, in conjunction with Mr. Arthur Cohen, Sir John Holker, Mr. Lewis Fry, and Mr. Monk, and was read a first time on the 19th July. Its object is to reproduce the existing law relating to bills, notes, and cheques, in a codified form, leaving any amendments which might appear desirable to be introduced at a later stage. If it were to pass, it would, of course, to a great extent supersede this Digest, but at present that seems a very unlikely event.

M. D. C.

August 1, 1881.

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LIST OF ABBREVIATIONS.

- Byles—Byles on Bills of Exchange. 12th edition. 1876.
- Chitty—Chitty on Bills of Exchange. 11th edition. 1878.
- Daniel—Daniel on Negotiable Instruments. New York. 1876.
- French Code—French Code de Commerce of 1818.
- German Exchange Law—German General Exchange Law of 1849.
- Nouguier—Nouguier's "Lettres de Change et Effets de Commerce." Paris. 4th edition. 1875.
- Pothier—Pothier, *Traité du Contrat de Change*. Paris. 1847.
- Story—Story's Commentary on the Law of Bills of Exchange. 4th edition. 1860.

INTRODUCTION.

AS far as form goes the present Digest is modelled on the Indian Codes, the main idea of which is as follows. A general proposition is first laid down. Qualifications or less obvious deductions, when of sufficient importance, are next stated in the form of Explanations. Then come the Exceptions, if any. These abstract propositions are illustrated, when necessary, by examples shewing their application to particular states of fact. Each general proposition, with its accompanying "explanations" and "exceptions," forms a separate article. The same plan has been adopted by Sir James Stephen, in his Digests of the Law of Evidence and of the Criminal Law, and by Mr. F. Pollock, in his Digest of the Law of Partnership. As regards the subject of codification generally, and its prospects in this country, I have little or nothing to say. Any reader interested in the matter, will find it fully discussed by the above mentioned authors in the Introductions to the works referred to. These writers have also pointed out that Digests in the present form may be to some extent helpful in preparing the way for codification at home.* In the meantime, I hope the form adopted may be found convenient for a text book. As regards details of plan I must offer a few words of explanation.

For the most part, provisions applicable to Bills of Exchange are equally applicable to Promissory Notes and

¹ See, too, the Report of the Digest of Law Commission, 13 May, 1867.

Cheques; therefore the term "Bill" is used in the articles of this Digest as meaning and including Promissory Note and Cheque, as well as Bill of Exchange. When a provision does not apply equally to Notes and Cheques the full expression "Bill of Exchange" is used, and the distinction is pointed out in a note. The provisions peculiar to Promissory Notes and Cheques are collected in two chapters at the end of the book. This plan has been adopted, first, in order to economise space, and secondly in order to give a clearer and more consecutive account of a Bill of Exchange, which is the typical and most important negotiable instrument. As to the second reason, I would refer to the remarks of Mr. Justice Story, in the preface to his work on Bills of Exchange. Subject to the explanation given above, I hope this extensive meaning given to the word "Bill" is justified, and will not lead to confusion. There is to some extent authority for the course pursued. In the Stamp Act, 1870, "Bill of Exchange" is defined so as to include Cheque, and in the reported cases on cheques the instrument is frequently termed a "Bill," as indeed for most purposes it is. In the older cases on promissory notes the instrument is called indifferently a Bill or Note.

To save space letters are substituted for names in the Illustrations, and to facilitate reference and comparison the same letter is always used to denote the same party to a Bill or Note. Thus A. is always used for the drawer of a bill; B. for the drawee or acceptor of a bill or the maker of a note; C. for the payee and first indorser of a bill or note. When a case is quoted, the date is given. This avoids the necessity of referring to more than one report; and where cases are in conflict, it enables the reader to see at a glance which is the most recent and therefore the most authoritative. Where a case directly decides the point it is quoted to establish, the name is given simply; but when it only decides the point by

implication or is relied on as an analogy, or when it merely contains an obiter dictum on the subject, the name is preceded by the mark *cf.* (*compare*).

Anything like a detailed discussion of doubtful cases, or a history of past controversy on points which may now be considered as settled, would be foreign to the purpose of a work like this ; but I have added to the ordinary Index of Cases, a list of the more important cases which have been overruled, doubted or explained *nominatim*, see p. xxiii. The list has no pretension to completeness, but perhaps it may be useful as far as it goes. Several of the articles go beyond the logical limits of a digest of a special subject, inasmuch as they state propositions which apply not only to bills, but to all simple contracts alike. In some few cases of frequent occurrence, this is done in the hope that the book may thus be more useful to men of business, who have not other books of reference at hand. In the majority of cases it is done because doubts have arisen as to whether bills were or were not governed by the ordinary rules. In a Code all such articles would be superseded by a single proposition to the effect that when the contrary is not expressed the ordinary rules of law applicable to simple contracts apply to bills. In an un-authoritative Digest, such a proposition seems merely nugatory.

It is almost needless to point out, that the similarity between the Indian Codes and a Digest like the present is merely resemblance in form. There all analogy ends. In a Code the subject in hand is treated completely and finally. A Code states methodically the law as the legislature is of opinion that it ought to be. This Digest is an attempt to state methodically the law as it is. In a Code, propositions and illustrations are alike authoritative. In this Digest, the illustrations taken from decided cases are alone authoritative. The general propositions are only entitled to weight in so far

as they are complete and legitimate inductions from decided cases which are unquestioned law. A general proposition, supported by reference to cases, merely amounts to a verifiable hypothesis as to what the law is. In the theory of English law, there exists *in nubibus* a complete set of principles applicable to every conceivable state of facts that can arise. Theoretically the judges do not make law. They only interpret it. They are merely the conductors by which the principle is brought down from the clouds and made available to men. Practically, however, their functions are frequently and of necessity legislative. If a wide subject be investigated systematically, four states of the law will be found to exist. First, the law on a given point may be reasonably certain. All authority, or the great weight of authority, may be in favour of a given proposition. Secondly, a proposition on a given point can only be stated as probably holding good. For instance, it may rest merely on unchallenged obiter dicta, or there may be a decision in favour of it, and weighty obiter dicta opposed to it. Thirdly, the law on a given point may be uncertain. Decisions may be in direct conflict, or again there may be a decision in point which has never been directly questioned, but the ratio decidendi of which seems entirely opposed to the principle of later cases. Fourthly, there may be an entire absence of authority on a given question. Such being the state of the materials available for forming a Digest, it is clear that if the subject is to be treated methodically, many propositions can only be stated tentatively. Many of the articles, therefore, are qualified with a (probably) or a (perhaps), and the reason of the qualification is then stated in a note.

On doubtful points frequent reference is made to American cases and Continental Codes and writers. In mercantile matters, when the law is uncertain or authority wanting, there is an increasing tendency to refer to Foreign Codes and

laws in order to see how other nations have solved the difficulty. This is especially the case as regards negotiable instruments, the most cosmopolitan of all contracts. Mr. Justice Story, in his judgment in *Swift v. Tyson* (16 Peters, 1), gives forcible expression to the principle. He says, "The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr. 887), to be in a great measure, not the law of a single country only, but of the commercial world. Non erit lex alia Romæ, alia Athenis, alia nunc alia post hac, sed et apud omnes gentes et omni tempore una eademque lex obtinebit."

An American decision, it is needless to say, is not a binding authority in this country, but, if well reasoned, it is always considered with respect by our Courts.* Many of the American judgments are very valuable as expounding and testing the principles of English decisions. An English case there, like an American case here, is only an authority in so far as it appears to be a correct deduction from the general principles of common law and the law merchant which prevail in both countries alike.

When the subject matter of an article of this Digest is dealt with by the French 'Code de Commerce,' or the 'German General Exchange Law, 1849,' their respective provisions are compared. If they agree, a mere reference to the corresponding sections is given. If they differ, the points of difference are given in a note. A vast number of the bills circulated in England are foreign bills. It seems useful, therefore, to indicate the main points of divergence which may give rise to a conflict of laws. The French Code is especially important, as it forms the basis of most of the continental Codes: For instance, the Italian Code of 1865 enacts for Italy the provisions of the French Code regarding

* See per Cockburn, C.J., in *Scaramanga v. Stamp* (1880), 5 C. P. D. at 303, C. A.

bills and notes, merely adding three or four articles which embody the result of French judicial decisions on the construction of the Code. The Belgian Code de Commerce of 1872, with a few exceptions, does the same for Belgium. Egypt, Greece, and Turkey have, I believe, adopted the provisions of the French Code in their entirety. The Spanish Code of 1830 and the Portuguese Code of 1833 are mainly founded on the French Code de Commerce. French law is worthy of attention in another respect. In the absence of English authority, our Courts have, in some instances, consciously taken it as their guide. (See per Parke, B., in *Foster v. Dawber*, 6 Exch. 852.) The 'Code de Commerce,' to a great extent, embodies and enacts the opinions of Pothier, whose authority, says Best, C. J. (in *Cox v. Troy*, 5 B. & Ald. 481), "is as high as can be had next to the decision of a Court of Justice in this country." On doubtful points not dealt with by the Code, reference is occasionally made to Pothier, and also to the exhaustive treatise of M. Nouguiet (*Des Lettres de Change et des Effets de Commerce*, 4th ed., 1875), which gives the latest results of French law.

The German General Exchange Law of 1849 (slightly modified 1869), is important in two respects. First, it is the most elaborate and carefully worked out of the foreign Codes. Secondly, it is an international and not merely a national Code. All the German states, including Austria, have adopted it, and the terms of its adoption are these. Each state is at liberty to supplement it by additional laws of its own, but such laws are not in any way to contradict or override it. M. Nouguiet, in the work above referred to, gives in French the text of the Exchange Law, and also the various supplementary laws passed by the different states.

It would probably be very advantageous to the commercial world if this principle of an International Code could be

further extended. The difficulties of carrying it out do not seem insuperable, though, doubtless, they would be great. The provisions of such a Code would have to be settled by agreement, and then each state would enact it for its own territory. In the case of England, it would probably be necessary to confine its operation to foreign bills, that is to say, to bills drawn or payable abroad. Our law, as regards foreign bills, does not widely diverge from the law of other commercial countries, and it diverges chiefly by allowing greater latitude than is adopted in practice.

Occasional reference is made to the Indian Draft Code. For some reason I am not aware of it has never been enacted.* It is to be found in the 3rd Report of the Indian Law Commissioners (1867). The Commission was a strong one, as it included Lord Justice James, Mr. Justice Lush, and Mr. Lowe. The draft code is preceded by a report which points out where the provisions of English Law have been departed from. The document, therefore, is valuable as showing what, in the opinion of the Commissioners, the English law is, and also where it ought to be changed. In a work like the present, it is thought it would be waste of space to carry references to foreign laws or authorities any further, but it may be worth while to mention where they can be found.

Borchardt (*Vollständige Sammlung der geltenden Wechsel- und Handels Gesetze aller Länder*, 1871), collects the statutory enactments of all countries relating to Bills of Exchange. Part I. gives a German translation, Part II. the original text. More than forty countries have codified their law on this subject; in fact, England and the United States seem to be the only civilised nations which have not done so. Since Borchardt's work was published the Egyptian Commercial

* Since this was written in 1878, the Indian Government have again taken up the subject. The draft Code has been re-drafted and referred to a select committee of the Legislative Council, and will probably soon become law.

Code has, I believe, been re-cast. I do not know how far the provisions relating to bills have been altered. A new Commercial Code has been enacted for the Netherlands, and an official translation of the part relating to negotiable instruments has been published in England. [See Commercial, No. 30, of 1880, C. 2609.] M. Nouguiér in a supplementary Chapter to his work on Bills (*Des Lettres de Change*, 1875), compares the laws of the chief commercial nations with the French Code. M. Massé's "*Droit Commercial et des Gens*" is a valuable work on the conflict of laws—especially as regards Bills. The latest American book, I believe, is Daniell on Negotiable Instruments, 1877. Story on Bills of Exchange, and Parsons on Notes and Bills, are also standard American works. Thomson on Bills of Exchange, is the standard book on Scotch law, which, it must be remembered, differs materially from the English.

The origin and history of Bills of Exchange and other negotiable instruments are traced by the present Lord Chief Justice in his judgment in *Goodwin v. Roberts* (1875), 10 L. R. Ex., pp. 346—358. It seems that Bills were first brought into use by the Florentines in the twelfth century. From Italy the use of them spread to France, and eventually they were introduced into England. The first English reported case in which they are mentioned is *Martin v. Boure* (Cro. Jac. 6), decided in 1603. At first the use of Bills of Exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons whether traders or not. The law throughout has been based on the custom of merchants respecting them; the old form of declaration on bill used always to state that it was drawn "*secundum usum et consuetudinem mercatorum*." In the time of Chief Justice Holt, a controversy arose between the courts and the merchants, as to whether the customary inci-

dents of negotiability were to be recognised in the case of promissory notes. The dispute was settled by the stat. 3 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes. Again, in 1873, the Court of Queen's Bench were of opinion that documents other than bills and notes could not be endowed by custom with the incidents of negotiability. But the efficacy of custom was again upheld by the Exchequer Chamber in 1875, in *Goodwin v. Roberts*, where it was determined that foreign scrip might be rendered negotiable by custom, so as to pass with a good title, and free from all equities to a bonâ fide purchaser. The Court then say (p. 356), "While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that if a usage is once shown to be universal it is the less entitled to prevail, because it may not have formed part of the law merchant as previously recognised and adopted by the Courts." The House of Lords approved the decision in 1876.

The results of this formation of the law by custom are instructive. A reference to Marius' treatise on Bills of Exchange, written about 1670, or Beawes' *Lex Mercatoria*, written about 1720, will show that the law, or perhaps rather the practice, as to Bills of Exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is, that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a Code by the 'Ordonnance de 1673,' which is amplified but substantially adopted by the Code de Commerce of 1818. Its development was

thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A Bill of Exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will show how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly, it was otherwise, see the definition of bill in Comyn's Digest.*) In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a Bill of Exchange necessarily presupposes a contract

* "A bill of exchange is when a man takes money in one country or city upon exchange, and draws a bill whereby he directs another person in another country or city to pay so much to A. or order for value received of B., and subscribes it."

of exchange.* In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise.† In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when indorsed in blank. In France an indorsement in blank merely operates as a procuration. An indorsement, to operate as a negotiation, must be an indorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder in the meantime is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve.

M. D. C.

November, 1878.

* This rule is said to be now obsolete; but the Code remains unaltered.

† See *Stewart v. Hodges* (1692), 12 Mod. 36.

A DIGEST

OF THE LAW OF

BILLS OF EXCHANGE.

CHAPTER I.

FORM AND INTERPRETATION OF BILLS.

[EXPLANATORY HEAD NOTE.—The term “Bill,” as used in the articles of this Digest, includes, *mutatis mutandis*, Promissory Note and Cheque as well as Bill of Exchange. When a provision does not apply equally to Notes and Cheques, the full expression “Bill of Exchange” is used. See Introd., p. iv., and head note to chaps. IX. and X.]

Art. I. A Bill of Exchange is an unconditional ^{Bill of Exchange defined.} order in writing, addressed by one person to another, signed by the person who gives it, requiring the person to whom it is addressed to pay on demand, or at a determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer.

NOTE.—A Bill of Exchange is frequently called a “Draft.” By English law no particular form of words is requisite to its validity (Art. 10), and it need not necessarily be negotiable (Art. 8). A comparison of the above definition with the definition of “Bill of Exchange” in the Stamp Act, 1870, will show that many instruments require to be stamped as bills to which the mercantile incidents of a bill do not attach. By German Exchange Law, Art. 4, a bill must expressly mention that it is a Bill of Exchange. Subjoined are two common forms :

BILLS OF EXCHANGE.

Bill of
Exchange
defined.

FORM 1.—INLAND BILL.

No. 10. £100 0 0

London, 1st January, 1870.

Three months after date pay to our order the sum of one hundred pounds, for value received.

ANDREWS & Co.

To Messrs. Brown & Sons, London.

FORM 2.—FOREIGN BILL.

No. 10. Exchange for £100.

Calcutta, 1st January, 1870.

Six months after sight of this First of Exchange (Second and Third unpaid), pay to the order of Mr. John Charles, one hundred pounds for value received, and charge the same to account of Messrs. Smith & Co., against your letter of credit, No. 1.

JAMES ANDREWS.

To Mr. J. Brown, London.

Parties.

Necessary
parties.

Art. 2. There must, in point of form, be three parties to a Bill of Exchange in its origin, and two at least of these must be different persons. They are—

- (1.) The party who gives the order, called the drawer.
- (2.) The party thereby ordered to pay, called the drawee. If the drawee sign his assent thereto, he is called the acceptor, and becomes the principal debtor on the bill.
- (3) The party in whose favour the order is given, called the payee, or bearer, as the case may be.

Explanation 1.—The drawer and payee may be

the same person or firm, *i.e.* a bill may be drawn payable to the drawer, or his order.¹ Necessary parties.

Explanation 2.—A bill may be payable to the order of the drawee, if he act in two different capacities.²

ILLUSTRATION.

B. is in business on his own account. He is also agent for X. A bill is drawn on B. as agent for X., payable to his order on his own account. He accepts and indorses it. This is a valid bill.

NOTE.—It is clear that the instrument is not a bill, which can be enforced until it is indorsed away.³

Explanation 3.—If the drawer and drawee be the same person, or firm, or if the drawee be a fictitious person, the holder may treat the instrument, at his option, either as a Bill of Exchange or as a Promissory Note.⁴

ILLUSTRATIONS.

1. A. & Co. carry on business in London and Liverpool. The London house draw a bill on the Liverpool house. The holder may treat it as a note made by the London house payable in Liverpool; and if it be not paid, the omission to give notice of dishonour to the London house is immaterial.⁵

2. A. draws a bill on B. and negotiates it to C.; B. is a fictitious person. C. may treat the bill as a note made by A. He need not prove presentment or give notice of dishonour.⁶

3. The directors of a joint stock company draw a bill in the name of the company, addressed "To the Cashier." The holder may treat it as a note by the company.⁷

NOTE.—For purposes of proof, where drawer and drawee are the

¹ *Buller v. Cripps* (1704), 1 Salk. 130, German Exchange Law, Art. 6.

² *Holdsworth v. Hunter* (1830), 10 B. & C. 449; *Wille v. Williams* (1876), 28 Amer. R. 294; *Pardessus*, § 339.

³ *Cf. R. v. Bartlett* (1841), 2 M. & R. 362.

⁴ *Miller v. Thomson* (1841), 3 M. & Gr. 576; *Fairchild v. Ogdensburgh Railway Co.* (1857), 15 N. Y. 337; *Cf. German Exchange Law*, Art. 6.

⁵ *Id. Cf. Willans v. Ayers* (1877), 3 L. R. Ap. Ca. 133, P. C.

⁶ *Smith v. Bellamy* (1817), 2 Stark. 223.

⁷ *Allen v. Sea, Fire and Life Assurance Co.* (1850), 9 C. B. 574.

Necessary parties. same firm, the instrument can only be treated as a note, that is to say, there cannot be two proofs against the same estate because of the form of the instrument.¹

Holder. Art. 3. "Holder" means the person in possession of a bill, who by the Law Merchant is entitled to enforce the payment thereof. It includes equally payee, indorsee, or bearer.

NOTE.—Cf. Art. 125. Holder and *de facto* holder distinguished.

Signature of drawer. Art. 4. A Bill of Exchange must be signed by the drawer.²

Explanation.—The drawer's signature may be added at any time, but until it is there the instrument is inchoate and without effect (Art. 23).

ILLUSTRATION.

A. draws a bill on B, payable to drawer's order, but does not sign it. B. accepts, and it is transferred for value to C. The instrument is neither a bill nor a note.³

NOTE.—If a bill payable to drawer's order were indorsed by the drawer, though not signed by him on the face, this would probably be sufficient. It is so in France: *Nouguier*, § 199; Cf. Art. 32.

Designation of drawee. Art. 5. The drawee must be designated in a Bill of Exchange with reasonable certainty.⁴

ILLUSTRATIONS.

1. Instrument in the form of a bill, but addressed to no one. B. writes an acceptance thereon. This is not a bill, and B. is not liable as acceptor.⁵ He is, it seems, the maker of a note.

2. Instrument in the form of a bill payable to drawer's order, not containing the name of a drawee, but expressed to be payable

¹ *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, H. L.

² Cf. *Ex parte Hayward* (1871), 6 L. R. Ch. 546; German Exchange Law, Art. 4; *Nouguier*, § 87, 88, Netherlands Code, Art. 100.

³ *McCall v. Taylor* (1865), 34 L. J. C. P. 365; Cf. *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94.

⁴ Cf. *Peto v. Reynolds* (1854), 9 Exch. 410; 11 Exch. 418, Ex. Ch.; French Code, Art. 110; German Exchange Law, Art. 4.

⁵ Id. Cf. also, Arts. 37 and 58.

"at No. 1, X. Street, London." B., who lives there, accepts it. This is a bill, and B. is liable as acceptor.¹ Designation of drawee.

3. Instrument in the form of a bill. Where the address to the drawee should be, are the words "*at Messrs. B. & Co.*" This is a bill addressed to B. & Co.²

NOTE.—The question in *Illustr. 2* has arisen also in Scotland and France, and has been decided in the same way: *Thompson*, 2nd ed., p. 46; *Nouguier*, § 131. Cf. Art. 2 as to a Fictitious Drawee.

Art. 6. A Bill of Exchange may be addressed to two or more drawees, jointly, whether partners or not.³ Several drawees.

NOTE.—Can there be an alternative drawee? In *Anon.* (1701), 12 Mod. 446, a bill addressed to "B., or in his absence to X.," was accepted by B., and was held good. But, as far as appears, X. may have been an ordinary Case of need. An alternative drawee seems to make the payor uncertain.⁴ See Arts. 37, 39, 158, and 159, as to an acceptance by one or more, but not all, of several joint drawees.

Art. 7. A Bill of Exchange may designate one or more persons in addition to the drawee to be resorted to for acceptance or payment in case of need, *i.e.*, in the event of the bill being dishonoured by the drawee.⁵ Case of need.

NOTE.—Such person is called the drawee or referee in case of need, or simply the Case of need. According to French law the Case of need (*besoin* or *recommandataire*) must reside where the bill is payable (*Nouguier*, § 244; and cf. German Exchange Law, Art. 56); but this is not the case in England: see the language of 6 & 7 Will. 4, c. 58. A bill on Liverpool often names a Case of need in London: Cf. Art. 122. Indorser may name Case of need. Art. 184. Presentment to Case of need.

¹ *Gray v. Milner* (1818), 8 Taunt. 739.

² *Shuttleworth v. Stephens* (1808), 1 Camp. 407.

³ Cf. *Harmer v. Steele* (1849), 4 Exch. at 13, Ex. Ch.

⁴ Cf. *Ferris v. Bond* (1821), 4 B. & Ald. 679, construction of note signed in alternative.

⁵ Cf. *Re Leeds Banking Co.* (1865), 1 L. R. Eq. 1, and 6 & 7 Will. 4, c. 68; French Code, Art. 173; German Exchange Law, Art. 62.

To whom
payable.

Art. 8. A bill may be expressed to be payable to a person therein designated, or to his order, or to bearer.¹

ILLUSTRATIONS.

1. Pay C.—Pay the trustees of the X. Chapel.
2. Pay C. or order.—Pay to the order of C.
3. Pay to bearer.—Pay to ship "Fortune," or bearer.²
4. Pay ——— or bearer.³

Explanation 1.—A bill drawn payable to a particular person simply, without the addition of the words "or order," "or bearer," or their equivalents, is valid *inter partes*, but not negotiable.⁴

NOTE.—By French Code, Art. 110, a bill must be payable to order.⁵ A bill payable to bearer or to a particular person simply would be invalid. By German Exchange Law, Art. 4, the payee must be named. In Scotland, a bill is negotiable, unless words prohibiting negotiation are used, *e.g.*, "Pay C. only."⁶

Explanation 2.—A bill drawn payable to the order of a particular person is payable to him or his order.⁷

ILLUSTRATION.

Bill drawn thus, "Pay to the order of C.," C. can enforce payment to himself without indorsing it.⁸

Payee
must be
person *in
esse*.

Art. 9. The payee of a bill, not payable to bearer, must be an existing person capable of being ascertained and identified at the time it is issued.⁹

¹ Cf. *Storm v. Stirling* (1854), 2 E. & B. at 842.

² *Grant v. Vaughan* (1764), 3 Burr. 1516.

³ Cf. *Haussoullier v. Hartsinck* (1798), 7 T. R. 733.

⁴ *Plimley v. Westley* (1835), 2 Bing. N. C. at 251; Cf. Art. 107; and Netherlands Code, Art. 105.

⁵ See too, Spanish Code, Art. 430; Italian Code, Art. 196; Russian Code, Art. 295.

⁶ *Robertson v. Burdekin* (1843), 1 Ross L. C. 824. German Exchange Law, Art. 9, is to same effect.

⁷ *Smith v. McClure* (1804), 5 East, 476; and Cf. *Soare v. Glyn* (1845), 8 Q. B. at 30; *Harvey v. Cane* (1876), 34 L. T. N. S. 64.

⁸ Id.

⁹ *Cowie v. Sterling* (1856), 6 E. & B. 333 Ex. Ch.

Explanation 1.—Extrinsic evidence is admissible ^{Payee must be person *in esse*.} to identify the payee when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill.¹

ILLUSTRATIONS.

The following are valid :

1. Pay to C., D., and E., or the order of any two of them.²
2. Pay C. or his agent.—Pay the trustees of the X. Society, or their treasurer for the time being.—Pay C. or his wife.³
3. Pay to C., the treasurer for the time being of the X. Company.⁴
4. "Pay on demand, value received of C.," which in effect is "Pay to C. on demand."⁵
5. "Pay to the order of the Treasurer of Portugal." Evidence is admissible to show that C. was Treasurer of Portugal when the bill was issued.⁶
6. "Pay to J. Smythe." Evidence is admissible to show that T. Smith is the person intended to be described thereby.⁷

The following are invalid :

7. "Pay C. or D.,"⁸ there being no apparent community of interest.
8. Pay to the treasurer for the time being of the C. institution.⁹
9. "Pay — or order." Evidence is inadmissible to show that C. was intended to be the payee.¹⁰
10. "Pay on demand," stating no payee (probably invalid).¹¹

NOTE.—In *Norton v. Ellam*,¹² a note in form given in Illustr. 10,

¹ *Soares v. Glyn* (1845), 8 Q. B. 24 Ex. Ch.

² *Watson v. Evans* (1863), 32 L. J. Ex. 137.

³ *Holmes v. Jaques* (1866), 1 L. R. Q. B. 376; *Bourdin v. Greenwood* (1871), 13 L. R. Eq. 281.

⁴ *R. v. Boz* (1815), 6 Taunt. 325.

⁵ *Green v. Davies* (1835) 4 B. & C. 235.

⁶ *Soares v. Glyn* (1845), 8 Q. B. 24.

⁷ *Willis v. Barrett* (1816), 2 Stark. 29; *Jacobs v. Benson* (1855), 39 Maine, 132.

⁸ *Blanckenhagen v. Blundell* (1819), 2 B. & Ald. 417.

⁹ *Cowie v. Sterling* (1856), 6 E. & B. 333, Ex. Ch.; *Yates v. Nash* (1860), 29 L. J. C. P. 306.

¹⁰ *R. v. Randall* (1811), R. & R. 193. See Art. 23.

¹¹ *Minet v. Gibson* (1791), 1 H. Bl. at 608; *Douglas v. Wilkinson* (1831), 6 Wend. 637, New York.

¹² *Norton v. Ellam* (1837), 2 M. & W. 461; cf. *Enthoven v. Hoyle* (1852), 13 C. B. at 394.

Payee
must be
person *in
esse*.

seems to have been thought valid, but the point was not raised. Perhaps the note is wrongly set out. In a New York case, a note payable to "the order of the indorser," was held valid as being payable to any holder who might indorse it.¹

Explanation 2.—If the payee of a bill be a fictitious or non-existing person, no title can be made thereto except by estoppel (Art. 139).

Exception.—If a bill be made payable to a deceased person in ignorance of his death, his executors or administrators may adopt the transaction.²

ILLUSTRATION.

A. in England draws a bill in favour of C., who is in India. At the time the bill is drawn C. is dead, but the fact is not known to A. C.'s administrator may sue A, on the bill.³

NOTE.—The New York Draft Code, § 1726, enacts that a bill payable to the order of an obviously fictitious person is to be deemed payable to bearer.

Order to Drawee.

Order to
drawee.

Art. 10. The order to the drawee may be in any form of words, provided it be an unconditional requisition for the payment of money absolutely and at all events.⁴

ILLUSTRATIONS.

The following are valid, though unusual :

1. "Credit C. or order with 100*l.* in cash."⁵
2. "Pay, or cause to be paid, to C. or order 100*l.*"⁶

The following are invalid, as being conditional :

3. Pay C. or order 100*l.*, provided the terms mentioned in my letter be complied with."⁷

¹ *United States v. White* (1841), 2 Hill. R. 59.

² *Murray v. East India Co.* (1821), 5 B. & Ald. 204.

³ *Id.*

⁴ *Darvokes v. De Lorane* (1771), 3 Wils. at 213.

⁵ *Ellison v. Collingridge* (1850), 9 C. B. 570.

⁶ *Lovell v. Hill* (1838), 6 C. & P. 238.

⁷ *Kingston v. Long* (1784), 4 Dougl. 9.

4. Pay C. or order 100*l.*, to stand as a set-off for the sum be- Order to
 " " " queathed to me above the share of drawee.
 X.¹
5. " " to be held as collateral security for the
 payment of the money owed him by
 X. if he cannot realise the other
 securities.²
6. " " in consideration that he will abandon
 the action now pending.³
7. " " not to be demanded in the event of
 my death.⁴

The following is valid :

8. Pay C. or order 100*l.*, "as per memorandum of agreement."⁵

NOTE.—Cf. Art. 13 and Art. 19. As to construction, see Art. 56. Comparing bills with notes, the order to the drawee when accepted corresponds with the promise by the maker. It is the same contract stated conversely. There is, however, this distinction : A bill may not be drawn conditionally, and a note may not be made conditionally ; but a bill may be accepted conditionally ; therefore the liability of the principal debtor on a bill may be conditional, while the liability of the principal debtor on a note must be absolute. A bill absolute in form may be delivered conditionally. See Art. 55.

Explanation 1.—The direction must be imperative, not permissive or precative ; but the insertion of mere terms of courtesy will not make it precative.

ILLUSTRATIONS.

1. "Mr. B. will much oblige Mr. A. by paying C. or order."—Valid.⁶
2. "Please let bearer have 100*l.*, and you will much oblige me."—Invalid.⁷
3. "We authorise you to pay C. or order."—Invalid.⁸

¹ *Clarke v. Percival* (1831), 2 B. & Ad. 660.

² *Robins v. May* (1839), 11 A. & E. 213.

³ *Drury v. Macaulay* (1846), 16 M. & W. 146. *Aliter*, if consideration be executed.

⁴ *Richardson v. Martyr* (1855), 25 L. T. Q. B. 64.

⁵ *Jury v. Baker* (1858), E. B. & E. 459.

⁶ *Ruff v. Webb* (1794), 1 Esp. 129, Lord Kenyon. See too, *R. v. Ellor* (1784), 1 Leach C. C. 323.

⁷ *Little v. Stackford* (1828), 1 M. & M. 171.

⁸ *Hamilton v. Spottiswoode* (1849), 4 Exch. 200 ; and Cf. *Russell v. Powell*

Order to
drawee.

Explanation 2.—An order to pay out of a particular fund does not constitute a bill; but an absolute order to pay, coupled with (1) a direction to the drawee to reimburse himself out of a particular fund, or (2) a statement of the transaction which gave rise to the bill, is valid.

ILLUSTRATIONS.

The following orders or promises are invalid, and bills or notes:

1. Pay C. or order 100*l.* out of the money in your hands belonging to the X. Company.¹
2. " " out of the money due from X. as soon as you receive it.²
3. " " out of the money arising from my reversion when sold.³
4. " " on the sale or produce when sold of the X. Hotel.⁴
5. " " out of the moneys now due, or hereafter to become due, to me under the will of my late father, and before making any payment to me thereout.⁵

The following are valid:

6. Pay C. or order 100*l.* as my quarterly half-pay due 1st February by advance.⁶
7. " " being a portion of a value as under, deposited in security for the payment hereof.⁷
8. Pay C. or order 100*l.*, against cotton, per "Swallow."⁸

(1845), 14 M. & W. 418; *Diplock v. Hammond* (1854), 5 De G. M. & G. 320. Such orders may of course be valid as equitable assignments.

¹ *Jenny v. Herle* (1723), 2 Ld. Raym. 1361.

² *Dawkes v. De Lorane* (1771), 3 Wils. 287.

³ *Carlos v. Fancourt* (1794), 5 T. R. 482, Ex. Ch.

⁴ *Hill v. Halford* (1801), 2 B. & P. 413, Ex. Ch.

⁵ *Fisher v. Calvert* (1879), 27 W. R. 301, M. R.

⁶ *Macleod v. Snee* (1728), 2 Stra. 762.

⁷ *Haussoullier v. Hartsinck* (1798), 7 T. R. 733.

⁸ Cf. *Inman v. Clare* (1858), Johns. 769.

9. Pay C. or order 100*l.*, on account of moneys advanced by me Order to
drawee.
for the X. Company.¹
10. " " against credit No. 20, and place it to
account, as advised per X. & Co.²

NOTE.—See the English and American authorities collected and reviewed in *Munger v. Shannon*.³ An order invalid as a bill may of course be valid as an equitable assignment.⁴ The tendency in New York seems to be to give effect to an order rather as an equitable assignment than as a bill; *e.g.*, the following were held to be payable out of a particular fund: "Pay C. or order 100 dollars, and deduct the same from my share of our partnership profits." "Pay C. or order 100 dollars, on account of twenty-four bales of cotton shipped by you, as per bill of lading."

Explanation 3.—The order must require the payment of money.⁵

ILLUSTRATIONS.

The following are not bills :

1. An order for the delivery to bearer on demand of a certain quantity of iron.⁶
2. Pay C. or order 100*l.* "in good East India bonds."⁷
3. " " "in notes of the chartered banks of
Pennsylvania."⁸
4. " " "in cash or country bank notes."

NOTE.—In *Ex parte Imeson* (1825), 2 Rose, 225, an order to pay in "cash or Bank of England notes" was held invalid. But now, by the Bank Charter Act, 1833, 3 & 4 Will. 4, c. 98, § 6, Bank of England notes are made legal tender. As to legal tender in general see *The Coinage Act*, 1870 (33 Vict. c. 10) ss. 4—6. In *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194, it was held that scrip certificates of a banking company, payable to bearer, were negotiable for the purpose of passing with a good title to a *bond fide* purchaser for value, who took them without notice that

¹ *Griffin v. Weatherby* (1868), 3 L. R. Q. B. 753.

² Cf. *Banner v. Johnston* (1871), 5 L. R. H. L. 157.

³ *Munger v. Shannon* (1874), 61 New York R. 251; see too, *Corbett v. Clark* (1878), 30 Amer. R. 763.

⁴ *Buck v. Robson* (1878), 3 Q. B. D. 686; *Fisher v. Culver* (1879), 27 W. R. 301; see too, *Glyn v. Hood* (1860), 1 De G. F. & J. at 348 as to this distinction.

⁵ Cf. *Huse v. Hamblin* (1870), 4 Amer. R. 244.

⁶ *Dixon v. Bovill* (1856), 3 Macq. II. L. 1.

⁷ *Buller*, N. P. p. 272.

⁸ *McCormick v. Trotter* (1823), 10 S. & R. 282.

Order to the vendor had no title (following *Goodwin v. Roberts* (1876), 1 App. Cas. 476, as to foreign scrip). How far such documents would have the other incidents of negotiable instruments was not decided : Cf. Art. 282 as to notes under Seal.

Explanation 4.—The order must not require the drawee to do any act in addition to the payment of money.¹

ILLUSTRATIONS.

The following are not bills :

1. Pay C. or order 100*l.*, and deliver up the wharf to him.²
 2. " " and take up my note for that amount.³
- NOTE.—Cf. Art. 277. Note in alternative.

Sum payable.

Sum payable.

Art. 11. A *negotiable* Bill of Exchange may not be drawn for any sum less than 20*s.*

NOTE.—An instrument which contravenes this rule is void, and any person who issues or negotiates it is liable to a penalty of not less than £5 and not more than £20.⁴ The Act applies to promissory notes. But by 23 & 24 Vict. c. 111, § 19, cheques for less than 20*s.* are made lawful. Bills and notes for less than 5*l.*, and over 20*s.*, were regulated by 17 Geo. 3, c. 30 ; but this Act was suspended, except as to notes payable to bearer on demand, by 26 & 27 Vict. c. 105, and the suspension is continued by 42 & 43 Vict. c. 67. See Art. 284. There are no restrictions as to amount in respect of non-negotiable bills and notes.

Statement of sum.

Art. 12. The sum for which a bill is drawn must be expressed.⁵

ILLUSTRATIONS.

1. Bill in this form, "Pay to my order £———" Evidence is not admissible to show that this is a bill for £100.⁶

¹ *Follet v. Moore* (1849), 4 Exch. at 416.

² *Martin v. Chantry* (1747), 2 Stra. 1271.

³ *Cook v. Satterlee* (1826), 6 Cowen, 108, New York.

⁴ 48 Geo. 3, c. 88, §§ 1–3.

⁵ *R. v. Elliott* (1777), 1 Leach, C. C. 175 ; French Code, Art. 110 ; German Exchange Law, Art. 4 ; Cf. Art. 23 ; and *Pothier*, No. 35.

⁶ *Norwich Bank v. Hyde* (1839), 13 Connecticut, 279 ; and Cf. *Saunderson v. Piper* (1839), 5 Bing. N. C. at 431. See Art. 23.

2. Bill in this form, "Pay to my order twenty-five, ten shillings." Statement of sum.
This is sufficient as a bill for 25*l.* 10*s.*¹

Explanation 1.—If the sum payable be expressed in words and also in figures, and there is a discrepancy between the two, the words prevail.²

ILLUSTRATION.

A bill is drawn, "Pay C. or order two hundred pounds." In the margin is superscribed 250*l.* This is a bill for 200*l.* only.³

Explanation 2.—The figures may supply an omission in the words.⁴

ILLUSTRATION.

A bill is drawn, "Pay C. or order one hundred." In the margin is inserted 100*l.* This is a bill for 100*l.*⁵

NOTE.—German Exchange Law, Art. 5, provides that if the amount be expressed both times in figures, or both times in words, and there is a discrepancy, the smaller sum is the amount payable.

Art. 13.—The sum payable must be a certain and definite sum. Sum to be certain.

ILLUSTRATIONS.

The following orders or promises are invalid :

1. Pay C. or order 100*l.*, and all other sums which may be due to him.⁶
2. " " the proceeds of a shipment of goods, value 2000*l.*, consigned by me to you.⁷
3. " " the balance due to me for building the Baptist College Chapel.⁸
4. " " and the demands of the sick club.⁹
5. " " and all fines, according to rule.¹⁰

¹ *Phipps v. Tanner* (1833), 5 C. & P. 488.

² *Saunderson v. Piper* (1839), 5 Bing. N. C. 425 ; German Exchange Law, Art. 5.

³ *Id.*

⁴ *R. v. Elliott* (1777), 1 Leach, C. C. 175.

⁵ *Id.*

⁶ *Smith v. Nightingale* (1818), 2 Stark. 375.

⁷ *Jones v. Simpson* (1823), 2 B. & C. 318.

⁸ *Crowfoot v. Gurney* (1832), 9 Bing. 372.

⁹ *Bolton v. Dugdale* (1833), 4 B. & Ad. 619.

¹⁰ *Ayrey v. Fearnside* (1838), 4 M. & W. 168.

Sum to
be certain.

Explanation 1.—The fact that the amount payable is payable by instalments,¹ or payable with interest, or that it is to be calculated according to an indicated rate of exchange, does not make it uncertain.

ILLUSTRATIONS.

The following are valid :

1. Pay C. or order 100l. "with lawful interest."²
2. " " "payable in Paris or in London, at the choice of the holder, according to the course of exchange upon Paris."³
3. " " "at the exchange, as per indorsement."⁴

NOTE.—See a statement of the practice as to the sale of foreign bills and the mode of fixing the exchange, *Suse v. Pompe*, 8 C. B. N. S. at 542. To indorse a rate of exchange without authority is a material alteration which avoids a bill: *Hirschfield v. Smith* (1866), 1 L. R. C. P. 340.

Explanation 2.—When a bill is drawn in one country and payable in another, and the amount payable is expressed in the currency of the former, it must be calculated according to the rate of exchange on the day the bill is payable.⁵

ILLUSTRATION.

A. in England draws a bill on B. in France for 100l. sterling. The amount in francs which the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable.⁶

Explanation 3.—When a bill is drawn in one country payable in another in the currency of the latter, and such currency is depreciated between the time of issue and of payment, the holder is (per-

¹ Art. 19, Expl. 2.

² Cf. *Warrington v. Early* (1853), 2 E. & B. 763.

³ Cf. *Pollard v. Herries* (1803), 3 B. & P. 335.

⁴ *Rouquette v. Overman* (1875), 10 L. R. Q. B. at 531.

⁵ Cf. *Hirschfield v. Smith* (1866), 1 L. R. C. P. at 353; Belgian Code, Art. 33.

⁶ Id.

haps) entitled to be paid according to the former value.¹ Sum to be certain.

ILLUSTRATION.

A bill is drawn in England on Portugal for "100 mille rees." After it is drawn, but before it is payable, a depreciated paper currency is introduced. The holder is entitled to be paid in the former currency or to receive its equivalent.²

NOTE.—This decision seems opposed in principle to *Overman v. Rouquette* (1875), 10 L. R. Q. B. 525, where it was held that the time of payment might be deferred by *ex post facto* legislation, the drawer's liabilities being regulated by the *lex loci solutionis*.

Explanation 4.—When a bill is expressed to be payable with interest, interest runs from the date of the bill, and the amount payable must be calculated accordingly.³

ILLUSTRATIONS.

1. Bill for 200*l.*, expressed to be payable with interest six months after date. The amount payable at maturity is 205*l.*⁴

2. C., a married woman, as administratrix, lends 100*l.* to her husband, who makes a note for the amount, expressed to be payable to C. with interest. Interest runs from the date of the note, although C. could not sue on it during her husband's lifetime.⁵

3. B. makes a note, expressed to be payable with interest one year after his death. Interest runs from the date of the note.⁶

NOTE.—When the rate of interest is not expressed, five per cent. is understood. Since the abolition of the Usury Laws there is no limit as to the rate the parties may agree on. In many American States and continental countries usury laws are still in force. As to interest as damages in case of non-payment, see Arts. 213 and 220.

Expression of Consideration.

Art. 14. It is not necessary to insert in a bill the Value received.

¹ *Da Costa v. Cole* (1638), Skin. 272.

² *Id.*

³ *Doman v. Dibdin* (1826), R. & M. 336.

⁴ *Id.*

⁵ *Richards v. Richards* (1831), 2 B. & Ad. 447.

⁶ *Roffey v. Greenwell* (1839), 10 A. & E. 222.

Value
received.

words "value received," or any equivalent expression denoting consideration.¹

NOTE.—German Exchange Law, Art. 4, does not require the consideration to be stated. By French Code, Art. 110, the nature of the consideration must be stated in the bill. A false statement of value constitutes a "supposition de valeur," and avoids the bill in the hands of parties with notice: *Nouguier*, §§ 282, 283. See *post*, Consideration, Art. 82.

Explanation 1.—In a Bill of Exchange payable to a third party "value received" means, *primâ facie*, value received by the drawer;² but in an accepted bill, payable to drawer's order, it means value received by the acceptor.³

Explanation 2.—When a bill is expressed to be for value received, extrinsic evidence is admissible between immediate parties to prove absence, failure, or illegality of consideration; but when a particular consideration is expressed, extrinsic evidence is not admissible to prove a different consideration.⁴

ILLUSTRATIONS.

1. A note is expressed to be given "for commission for business transacted." In an action by payee against maker, evidence is admissible to show that the consideration wholly failed, and that the payee never earned his commission.⁵

2. A note is expressed to be given "for value received by my late husband." Evidence is not admissible to show that the note was given merely as an indemnity, and that the payee had not been damnified.⁶

3. C., the payee of a bill, expressed to be for value received,

¹ *Hatch v. Traves* (1840), 11 A. & E. 702.

² *Grant v. Da Costa* (1815), 3 M. & S. 351.

³ *Highmore v. Primrose* (1816), 5 M. & S. 65.

⁴ *Abbott v. Hendricks* (1840), 2 Scott, N. R. 183; and Cf. *Abrey v. Cruz* (1869), 5 L. R. C. P. 37; *Hill v. Wilson* (1873), 42 L. J. Ch. 817.

⁵ *Id.*

⁶ *Rideout v. Bristow* (1830), 1 Cr. & J. 231; Cf. *Nelson v. Serle* (1839), 4 M. & W. 795. *Knill v. Williams* (1809), 10 East, 431.

sues the acceptor. The acceptor may show that the bill was drawn Value and accepted for C.'s accommodation.¹ received.

NOTE.—The principle is clear, but the application of it to cases near the line is difficult. In *Abbot v. Hendicks* (1840), 1 M. & Gr. at 796, Maule, J., is reported as saying that a different consideration to the one alleged may be shown; but in 2 Scott, N. R. at 187, he is reported as saying the opposite, and this accords with what the other judges say: Cf. Art. 56.

Explanation 3.—A bill must not be expressed to be given for an executory consideration.²

NOTE.—An executory (i.e., future) consideration expressed on the instrument would it seems render it conditional, and so invalid as a bill: Cf. Art. 10.

Date of Making.

Art. 15. It is usual, but not necessary, to insert Date of making in a bill the date on which it is drawn.

Explanation.—A bill, expressed to be payable after date, should be dated; but evidence is (perhaps) admissible to show on what day such bill, if undated, was issued, and it takes effect from that time.³

ILLUSTRATION.

A. draws, without dating, a bill on B., payable to C. three months after date. C. can give evidence to show on what day the bill was issued to him?

NOTE.—Byles, Chitty, and Parsons are of this opinion, relying on *Giles v. Bourne*,³ where, however, the point arose on the pleadings and not on the evidence. No question could arise except in the case of a bill payable after date: Cf. the Scotch law, under 19 & 20 Vict. c. 60, § 10. German Exchange Law, Art. 4, requires a bill to be dated; so does the French Code, Art. 110. Pothier (No. 36), writing before the Code, says "Want of a date or mistake therein cannot be taken advantage of by the drawer of the bill, or by the drawee if he accepts it."

¹ Cf. *Thompson v. Clubley* (1836), 1 M. & W. 212.

² *Drury v. Macaulay* (1846), 16 M. & W. 146.

³ Cf. *Giles v. Bourne* (1817), 6 M. & S. 73; but cf. Art. 23.

Ante-dat-
ing or
post-
dating.

Art. 16. A bill may be ante-dated or post-dated.¹

ILLUSTRATION.

A. draws a bill on B., bearing date May 1, payable to C.'s order. C. indorses to D., who sues A. It appears that C. died in April. D. may show that the bill was post-dated, and that C. really indorsed it. He can then recover.²

NOTE.—But bankers licensed under 9 Geo. 4, c. 23, are by § 12 liable to a penalty for issuing post-dated bills or notes unstamped. Under the suspended Act, 7 Geo. 4, c. 6, there was a penalty for post-dating bills under 5*l*. The Acts prohibiting the post-dating of cheques are repealed by the Stamp Act, 1870. To ante-date a deed in order to defraud a third party is forgery.³

Presump-
tion as to
date.

Art. 17. A bill is *prima facie* presumed to have been issued on the day which it bears date.⁴

Exception 1.—When a bill is tendered in bankruptcy proceedings as evidence of a petitioning creditor's debt, the date must be confirmed by other evidence.⁵

Exception 2.—A bill bearing date on a Sunday is not presumed to have been issued on that day.⁶

NOTE.—In *Begby v. Levy*,⁷ the Court seemed to think that a bill issued on Sunday would be void in the hands of a holder with notice, but they suggested qualifications.

Time of Payment.

Bill pay-
able on
demand.

Art. 18. A bill may be payable (a) on demand, or (b) at a determinate future time.

¹ *Usher v. Dauncey* (1814), 4 Camp. 97; *Barker v. Sterne* (1854), 9 Exch. 684, ante-date; *Gatty v. Fry* (1877), 2 L. R. Ex. D. 265 (post-dated cheque), recognised *Clarke v. Roche* (1877), 3 Q. B. D. at 172.

² *Tasmore v. North* (1811), 13 East, 517.

³ *R. v. Rilson* (1869), 1 L. R. C. C. R. 200. See *passim*, *Re Gomersall* (1875), 1 Ch. D. 137, C. A. as to drawing ante-dated bills to defraud creditors, and S. C. under name of *Jones v. Gordon* (1877), 2 App. Cas. 625 H. L.

⁴ *Roberts v. Bethell* (1852), 12 C. B. at 778.

⁵ Cf. *Anderson v. Weston* (1840), 6 Bing. N. C. at 301.

⁶ *Begby v. Levy* (1830), 1 Cr. & J. 180.

⁷ *Id.* at p. 181.

- A bill is, in legal effect, payable on demand—
- (1.) Which is expressed to be so payable.
 - (2.) Which is expressed to be payable “at sight” or “on presentation.”¹
 - (3.) In which no time for payment is expressed.²

Bill payable on demand.

Where a bill is accepted or indorsed after its maturity it is, as regards the acceptor, who so accepts,³ and (probably) the indorser, who so indorses,⁴ deemed to be a bill payable on demand.

Art. 19. A bill payable at a future time may be expressed to be payable—

Bill payable in futuro.

- (1.) At a fixed future time.
- (2.) At a fixed period after date.
- (3.) At a fixed period after sight.
- (4.) On, or at a fixed period after, the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.⁵

Explanation 1.—An instrument expressed to be payable on a contingency does not constitute a bill; and the happening of the event does not cure the defect.⁶

ILLUSTRATIONS.

The following are valid :

1. Pay C. or order 100*l.* ten days after the death of X.⁷

¹ 34 & 35 Vict. c. 74.

² *Whitlock v. Underwood* (1823), 2 B. & C. 157; *Aldous v. Cornwall* (1868), 3 L. R. Q. B. 573.

³ *Musford v. Walcott* (1698), 1 Ld. Raym. 574.

⁴ *Patterson v. Todd* (1852), 18 Pennsylvania R. 433. *Essenlow v. Dillenback* (1878), 22 Hun. New York R. 23.

⁵ *Colehan v. Cooke* (1742), Willes 393; Cf. Art. 10.

⁶ Id. at 399; and *Carlos v. Fancourt* (1794), 5 T. R. 482.

⁷ *Colehan v. Cooke* (1742), Willes, 393.

Bill payable <i>in futuro</i> .	2.	Pay C. or order 100 <i>l.</i> two months after H.M. ship "Swallow" is paid off. ¹
	3.	" " on the 1st January, when he comes of age. ²
	4.	" " one year after notice. ³
	5.	" " one year after my death. ⁴
	6.	" " two months after demand in writing. ⁵
	7.	" " five years after the opening of the S. Railway. ⁶

The following are invalid :

8. Pay C. or order 100*l.*, when I marry X.⁷
9. " " when I am in good circumstances.⁸
10. " " thirty days after the arrival of ship "Swallow" at Calcutta.⁹
11. " " ninety days after sight, or when realized.¹⁰
12. " " ninety days after the dissolution of partnership between C. and X. and the settling of the books.¹¹

NOTE.—Under the French Code, Art. 129, and German Exchange Law, Art. 4, such forms as are given in Illustrations 1 to 6 would probably be invalid. A bill, however, may be made payable at a particular fair or market (*en foire*), though the day on which it will be held is not known. Such bills seem to have been anciently known in England as "*billæ nundinales*." ¹²

Explanation 2.—A bill may be expressed to be payable by stated instalments, and may provide that

¹ *Colehan v. Cooke* (1742), Willes at 399.

² *Goss v. Nelson* (1757), 1 Burr. 228.

³ *Clayton v. Gosling* (1826), 5 B. & C. 360.

⁴ *Roffey v. Greenwell* (1839), 10 A. & E. 222.

⁵ *Price v. Taylor* (1860), 5 H. & N. 540.

⁶ Cf. *Ex parte Gibson* (1869), 4 L. R. Ch. 662. No objection raised.

⁷ *Pearson v. Garret* (1649), 4 Mod. 242.

⁸ *Ex parte Tootell* (1798), 4 Ves. 372.

⁹ *Palmer v. Pratt* (1824), 2 Bing. 185.

¹⁰ *Alexander v. Thomas* (1851), 16 Q. B. 335.

¹¹ *Sackett v. Palmer* (1857), 25 New York R. 179.

¹² Cf. *Colehan v. Cooke* (1742), Willes at 399. See French Code, Art. 133; German Exchange Law, Art. 33.

upon default in payment of one instalment the whole is to become due.¹ Bill payable in futuro.

ILLUSTRATIONS.

1. Pay C. or order 100L., "by two equal instalments, due 1st January and 1st July." This is valid.²
2. " " " "by instalments," not stating date or amount. This is invalid.³
3. " " " "by ten equal instalments, payable &c., all instalments to cease on the death of X." This is invalid.⁴

Art. 20. Subject to the provisions of this article as to non-business days, in computing time, unless the contrary be expressed, three Days of Grace are added to the nominal time of payment in the case of all bills which are not in legal effect payable on demand.⁵ Computation of time of payment.

If a bill be payable after date, after sight, or after the happening of some event, the nominal time of payment is determined by excluding the day from which time is to run, and including the day of payment.⁶

"Month" means calendar month.⁷

ILLUSTRATIONS.

1. A note dated 31st January is payable one month after date,

¹ *Carlon v. Kenealy* (1843), 12 M. & W. 139; *Cook v. Horne* (1873), 29 L. T. N. S. 369.

² *Gaskin v. Davis* (1860), 2 F. & F. 294.

³ *Moffat v. Edwards* (1841), Car. & M. 16.

⁴ *Worley v. Harrison* (1835), 3 A. & E. 669.

⁵ *Oridge v. Sherborne* (1843), 11 M. & W. at 381, *Bowen v. Newell* (1853), 8 New York, 190; Cf. Art. 18.

⁶ *Campbell v. French* (1795), 6 T. R. at 212; Story, § 329; *Roehner v. Knickerbocker Life Ass. Co.* (1875), 63 New York, 160; and Cf. German Exchange Law, Art. 32.

⁷ *Webb v. Fairmaner* (1838), 3 M. & W. 473; Cf. German Exchange Law, Art. 32; French Code, Art. 132.

Computation of time of payment. "without grace." It is due on February 28. A similar note, dated January 1, would be payable on February 1.¹

2. A note for 100*l.* is made payable by two equal instalments, on January 1 and February 1. The instalments fall due on January 4 and February 4.²

3. A bill dated January 1 is payable thirty days after date. It is due on February 3.

4. A non-negotiable note, not payable on demand, is entitled to days of grace.³

5. A bill dated 28 November, a bill dated 29 November, and a bill dated 30 November, each being payable three months after date, all fall due on March 3, inasmuch as February has but 28 days.

NOTE.—It is believed that all countries, except those where the Greek Church is the prevailing religion, use the New Style, or Gregorian Calendar. The number of days of grace allowed differs in different countries. By French Code, Art. 135, and German Exchange Law, Art. 33, days of grace are abolished. The Indian Draft Code proposed to do the same. The Bank of England pays its own bills without taking grace.

"After sight" in a Bill of Exchange means after acceptance or noting or protest for non-acceptance, *i.e.*, sight evidenced on the bill.⁴

ILLUSTRATIONS.

1. The holder of a foreign bill, payable sixty days after sight, makes an agreement that if it be dishonoured by non-acceptance, he will re-present it for payment at maturity. Acceptance is refused. The time of payment must be calculated from the day the bill was protested, and not from the day of presentment to the drawee for acceptance.⁵

2. A bill is payable three months after sight. The acceptance bears date January 1. The bill is due on April 4.

3. Bill payable after sight is noted for non-acceptance on

¹ Cf. *Roehner v. Knickerbocker Life Ass. Co.* (1875), 63 New York R. 160.

² *Oridge v. Sherborne* (1843), 11 M. & W. 381.

³ *Smith v. Kendal* (1794), 6 T. R. 123.

⁴ *Campbell v. French* (1795), 6 T. R. 200, Ex. Ch.; Cf. French Code, Art. 131; German Exchange Law, Art. 32.

⁵ *Id.*

January 1. It is accepted *suprà protest* on January 5. The time of payment (probably) must be calculated from January 1.¹ Computation of time of payment.

NOTE.—As a promissory note cannot be accepted, “after sight,” in a note, means after mere exhibition to the maker.² A bill presented for acceptance is usually left for twenty-four hours with the drawee, but the custom is for the acceptance to bear date the day of presentment, and not the day of return to the holder—*e.g.*, a bill presented on a Saturday during business hours, is accepted and returned on the Monday; the acceptance should bear date of the Saturday. The holder is probably entitled to this as a matter of right.

“Usance” means customary time, *i.e.*, the time for payment as fixed by custom, having regard to the place where a bill is drawn and the place where it is payable.

ILLUSTRATION.

The usance between London and Amsterdam is one month; therefore a bill drawn in Amsterdam, dated January 1, payable in London at double usance, falls due on March 4.³

NOTE.—When the usance is a month, half usance means fifteen days: Cf. *Pothier*, No. 15. The existence of a usance will not be judicially noticed: it must be proved.

When a bill falls due on Sunday, Christmas Day, Good Friday, or on a day appointed by Royal proclamation as a fast or thanksgiving day, it is deemed to be due on the preceding day.⁴

When a bill falls due on a Bank Holiday, it is deemed to be due on the succeeding day.⁵

ILLUSTRATION.

A bill is payable three months after date. The last day of grace is the day after Christmas Day, a Bank holiday. It is due on the

¹ Such is the practice: see *contrà dicta* in *Williams v. Germaine* (1827), 7 B. & C. 468, at 471.

² *Sturdy v. Henderson* (1821), 4 B. & Ald. 592; and Cf. *Dixon v. Nuttall* (1834), 1 C. M. & R. 307, prior to 34 & 35 Vict. c. 74.

³ Cf. *Muford v. Walcot* (1700); 1 Ld. Raym. 574.

⁴ 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15.

⁵ 34 & 35 Vict. c. 17, § 1 & 2; The Bank Holidays Act, 1871.

Computation of time of payment. 27th December ; but if the last day of grace was Christmas Day, it would be due on the 24th ; and if the 24th was a Sunday, it would be due on the 23rd.

NOTE.—By French Code, Art. 134, a bill which falls due on a *dies non* (*ferié légal*) is payable the day before.

Where a bill is drawn in one country and is payable in another the computation of time is determined by the law of the place of payment.¹

ILLUSTRATIONS.

1. A bill is drawn in England, payable in Paris three months after date. After it is drawn, but before it is due, a moratory law is passed in France postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law.²

2. By French law, days of grace are not allowed. A bill drawn in France, payable in England, is entitled to three days' grace ; but a bill drawn in England, payable in France, is not entitled to grace.³

Place of Making and Payment.

Place of making.

Art. 21. It is not necessary to state in a bill the place where it is drawn.

NOTE.—By 9 Geo. 4, c. 65, a penalty is imposed on the issue or negotiation in England of bills or notes of less than 5*l.*, payable to bearer on demand, which are made or purport to be made in Scotland or Ireland : and see Art. 279. In France, the place where a bill is drawn must be stated : French Code, Art. 110 ; *Nouguier*, § 93—105. In Germany the law is the same as in England.

Place of payment.

Art. 22. The drawer of a Bill of Exchange may or may not indicate a place of payment therein : he may also indicate an alternative place of payment.⁴

¹ *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525.

² *Id.*

³ *Id.* at 535—538.

⁴ *Bayley ; Chitty ; Story*. Cf. *Pollard v. Hervies* (1803), 3 B. & P. 335.

NOTE.—By French Code, Art. 110, and German Exchange Law, Place of Art. 4, the place of payment must be stated. As to the effect of payment, the drawer stating or not stating a place of payment, see Art. 167, Presentment for Payment.

Explanation.—The drawer of a bill may make it payable at the house or place of business of some person other than the drawee.¹

ILLUSTRATION.

A. may draw a bill on B., in Liverpool, payable at Messrs. X. & Co.'s bankers, London.

NOTE.—The person at whose house or place of business a bill is drawn or accepted payable is sometimes called the "domiciliary," from the French term "domiciliaire," and the bill is said to be "domiciled" where payable.

Inchoate Bills.

Art. 23. (1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill,² it operates as a *primâ facie* authority to any person into whose hands it may subsequently come to fill it up as a complete bill in any form he pleases and for any sum the stamp will cover,³ using the signature for that of the drawer or the acceptor or an indorser;⁴ and in like manner when a bill is wanting in any material particular the person in possession of it has *primâ facie* authority to fill up the omission as he thinks fit.⁵

¹ Cf. French Code, Art. 111.

² *Baxendale v. Bennett* (1878), 3 Q. B. D. at 531, C. A.

³ *Id.*; *Hatch v. Scarles* (1854), 2 Sm. & G. at 152, 153; *Swan v. North British Australasian Co.* (1863), 2 H. & C. at 184.

⁴ *Collis v. Emmet* (1790), 1 H. Bl. 313, drawer; *Molloy v. Delves* (1831), 7 Bing. 428, acceptor; *Russell v. Langstaffe* (1780), 2 Dougl. 514; *Foster v. Mackinnon* (1869), 4 L. R. C. P. at 712, indorser.

⁵ *Crutchley v. Mann* (1814), 5 Taunt. 529, and cases *supra*.

Blank
signatures.

(2.) Where any such inchoate instrument is completed, it operates, and the liabilities of the parties accrue from the time when it is issued in a complete form, and not from the time when the signatures were attached.

(3.) As between immediate parties, or as regards a remote party who is affected with notice, in order that any such instrument when completed may be enforceable against a person who became a party thereto prior to its completion, it may be filled up within a reasonable time,² and strictly in accordance with the authority given.³

If the bill, after its completion, gets into the hands of a *bonâ fide* holder for value without notice, the *primâ facie* presumption that it was duly filled up becomes absolute.⁴

ILLUSTRATIONS.

1. A. draws a bill payable to — or order. Any *bonâ fide* holder may write his own name in the blank, and sue on the bill.⁵

2. B. who is indebted to X. gives him a blank acceptance for 100*l.* X. dies. If X.'s administrator fills up the paper as a bill payable to drawer's order, and inserts his own name as drawer he is entitled to receive and enforce payment against the acceptor.⁶

3. B. gives a blank acceptance to a money-lender who fills it up as a bill payable to drawer's order, inserting a fictitious signature as that of the drawer and indorser. If the bill afterwards gets

¹ *Montagu v. Perkins* (1853), 22 L. J. C. P. 187; *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94; *Ex parte Hayward* (1871), 6 L. R. Ch. 546.

² *Temple v. Pullen* (1853), 8 Exch. 389; *Montagu v. Perkins* (1853), 22 L. J. C. P. 187.

³ *Aude v. Dixon* (1851), 6 Exch. 869; *Hatch v. Scarles* (1854), 2 Sm. & G. 147 at 152; *Hanbury v. Lovett* (1868), 18 L. T. N. S. 366.

⁴ *Schultz v. Astley* (1836), 2 Bing. N. C. 544; *Foster v. Mackinnon* (1869), 4 L. R. C. P. at 712; *London and S. W. Bank v. Wentworth* (1880), 5 C. P. D. 96.

⁵ *Crutchley v. Mann* (1814), 5 Taunt. 529; Cf. Art. 9.

⁶ *Scard v. Jackson* (1876), 34 L. T. N. S. 65.

into the hands of a holder for value without notice, he can Blank
sue B.¹ signatures.

4. B. puts a blank acceptance in his desk. It is *stolen*, and then filled up as a bill. B. cannot be sued thereon even by a *bond fide* holder.²

5. B. gives a blank acceptance in the name of his firm to C. without the authority of his co-partners. C. gives the bill in this state to his partner for a private debt, who fills in the name of C.'s firm as drawer and payee. B.'s firm cannot be sued on this bill by C.'s firm.³

6. B. gives C. a blank acceptance to accommodate him and without receiving value. After B.'s death, C. fills it up and discounts it with D., who sees him fill it up. D. cannot recover the money from B.'s estate.⁴

7. B. and X. sign as makers a joint and several note, with blanks for the date and payee's name. B. signs on condition that the note shall only be issued if Y. also will join as maker. Y. refuses. X., who is in possession of the note, represents to C. that he has authority to issue it. He fills in C.'s name as payee, and transfers the note to him for value. C. cannot sue B.⁵

8. B. a bankrupt, gives a blank acceptance. It is filled up and negotiated after the close of the bankruptcy. The holder can sue, for it did not constitute a proveable debt.⁶

9. An incomplete bill which is sent in a parcel by Railway and lost, is not a security for the payment of money within the meaning of the Carriers Act.⁷

NOTE.—An instrument which is wanting in some one or more of the requisites of a complete bill, is in effect a transferable authority to create a bill, and while incomplete is subject to the ordinary rules of law relating to authorities—*e.g.*, an authority emanating from a firm is not revoked by the death of a partner.⁸

¹ *Schultz v. Astley* (1836), 2 Biag. N. C. 544; *London and S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96.

² *Baxendale v. Bennet* (1878), 3 Q. B. D. 525, C. A.

³ *Hogarth v. Latham* (1878), 3 Q. B. D. 643, C. A.

⁴ *Hatch v. Searles* (1854), 2 Sm. & G. 147.

⁵ *Arde v. Dixon* (1851), 6 Exch. 869.

⁶ *Goldsmid v. Hampton* (1858), 5 C. B. N. S. 94.

⁷ *Stoessiger v. South Eastern Railway* (1854), 3 E. & B. 549

⁸ *Usher v. Dauncey* (1814), 4 Camp. 97.

Inland and Foreign Bills.

Inland bill
defined.

Art. 24. Bills are either inland or foreign. "Inland bill" (except for stamp purposes : Cf. pp. 230, 231) means a bill—

- (1.) Both drawn and payable within the British islands ; or,
- (2.) Drawn within the British Islands, and drawn upon some person resident therein.

All other bills are foreign bills. "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty.¹

Explanation.—Unless the contrary appear by its terms the *prima facie* presumption is that a bill is an inland bill.²

ILLUSTRATIONS.

1. A. in Liverpool draws a bill on B. in London, who accepts it payable there. It is indorsed in France. This is an inland bill.³
2. A. in London draws a bill on B., who resides in London. B. accepts it, payable in Paris. This is an inland bill.
3. A. in London draws a bill upon B. in Brussels, but payable in London. B. accepts it. This is (probably) an inland bill.⁴

Bill of Exchange drawn in a Set.

Whole set
one bill.

Art. 25. A Bill of Exchange may be drawn in a set, each part of the set being numbered and con-

¹ 19 & 20 Vict. c. 97, § 7. See *post*, p. 266.

² Cf. *Armani v. Castrique* (1844), 13 M. & W. 443.

³ Cf. *Lebel v. Tucker* (1867), 3 L. R. Q. B. 77.

⁴ *Amner v. Clarke* (1835), 2 C. M. & R. 468.

taining a reference to the other parts. All the parts constitute but one bill.¹ Whole set
one bill.

ILLUSTRATIONS.

1. If one part of a set omit reference to the rest it becomes a separate bill in the hands of a *bonâ fide* holder.²

2. An agreement to deliver up an unaccepted bill drawn in a set is an agreement to deliver up all the parts in existence.³

Explanation.—A person who negotiates a Bill of Exchange drawn in a set, is bound to deliver up all the parts in his possession, but by negotiating one part he does not warrant that he has the rest.⁴

NOTE.—In England the obligation to give a set is probably a matter of bargain. By German Exchange Law, Art. 66, the payee is entitled to demand a set from the drawer; and if a bill, issued singly, be destroyed or lost, the indorsee can obtain a second of exchange by addressing himself to his immediate indorser, who applies to the indorser before, and so on up to the drawer. French law seems to be the same: *Nouguier*, §§ 205 and 219. The parts of a set (*duplicata*) must be distinguished from copies (*copie*): *Nouguier*, § 209; and German Exchange Law, Arts. 70—72.

Art. 26. Only one part of a set requires to be stamped. The remaining parts are exempt, “unless ^{set.} issued or in some manner negotiated apart” from the stamped part. If the stamped part of a set be lost or destroyed, the unstamped parts are admissible in evidence on proof of such loss or destruction.⁵

NOTE.—Presentment for acceptance is not a negotiation.⁶ Compare the terms of the present Stamp Act, quoted above, with those

¹ Cf. French Code, Art. 110; and *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. 849.

² German Exchange Law, Art. 66; and Cf. French Code, Art. 147.

³ *Kearney v. West Grenada Co.* (1856), 26 L. J. Ex. 15. *Ratio decidendi* not clear. How could drawee of unaccepted bill be liable to the holder? He might be to the drawer ultimately.

⁴ *Pinard v. Klockman* (1863), 32 L. J. Q. B. 82.

⁵ 33 & 34 Vict. c. 97, § 55. See Appendix, p. 273.

⁶ Cf. *Griffin v. Weatherby* (1868), 3 L. R. Q. B. at 760.

of the repealed Act 17 & 18 Vict. c. 83, § 6, which made it necessary for the holder to hold all the parts of a set. What, if any, is the effect of the change on the questions raised by Arts. 27—30?

Indorse-
ment of
set.

Art. 27. If the holder of a bill drawn in a set indorse two parts to different persons, he is (probably) liable on both, and every indorser subsequent to him is liable on the part he has himself indorsed.¹

NOTE.—The drawer signs all the parts of the set. An indorser sometimes signs all the parts that he holds, but by no means always. It is said an indorser is not bound to pay unless all the parts bearing his indorsement are given up to him or accounted for.² But in America, it is held that in the case of an accepted bill it is sufficient if the accepted part be given up, and in the case of an unaccepted bill, if the protested part be given up, there being no presumption that the missing parts have been improperly negotiated.³

Accept-
ance of
set.

Art. 28. The acceptance may be written on any part of a set,⁴ and it should be written on one only.⁵

NOTE.—Indian Draft Code, Art. 117, provides: "When one of a set has been sent for acceptance, the sender should, upon the others of the set, make a note of the address of the person in whose hands the part so sent for acceptance is. The omission to make such note does not deprive the holder of his right to negotiate the bill, but renders the sender responsible for damage resulting to any holder from such omission. The person in possession of the part sent for acceptance is bound to deliver it to the holder of the set to which such part belongs." Cf. German Exchange Law, Art. 68. This accords with mercantile usage.

Payment
of set.

Art. 29. Payment in due course of one part of a set discharges the whole bill.⁶

Exception 1.—If the drawee accept two parts,

¹ Cf. *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. 849; *Nouguier*, § 218; and *Holdsworth v. Hunter* (1830), 10 B. & C. 449; German Exchange Law, Art. 67; Indian Draft Code, Art. 116.

² *Société Générale v. Metropolitan Bank* (1873), 27 L. T. N. S. at 854.

³ *Downes v. Church* (1839), 13 Peters 205, *Story*, J.; 3 *Kent. Com.* 100.

⁴ 19 & 20 Vict. c. 97, § 6.

⁵ Cf. *Holdsworth v. Hunter* (1830), 10 B. & C. 449.

⁶ *Bylee*; French Code, Art. 147; German Exchange Law, Art. 67.

and such parts get into the hands of different ^{Payment of set.} *bond fide* holders, he is (probably) liable to pay both.¹

Exception 2.—If the acceptor pay without requiring the part bearing his acceptance to be delivered up to him, and such part be at maturity, outstanding in the hands of a *bond fide* holder, he is (probably) not discharged.²

ILLUSTRATION.

B. accepts a third of exchange. At maturity, the first and second are presented to him and he pays. It turns out that the third of exchange, with his acceptance on it, was at the time in the hands of a *bond fide* holder. B. is still liable to pay the third of exchange.

Exception 3.—The indorser who has indorsed two parts to different persons, and indorsers subsequent to him of the part not paid, are (probably) not discharged (Art. 27).

NOTE.—The exceptions as stated accord with mercantile opinion. Most foreign codes contain Exception 2. Art. 30, however, raises a difficulty.

Art. 30. If the parts of a set be negotiated to different persons, the holder whose title first accrues ^{Right of holder of one part.} is (perhaps) entitled to the whole set.³

ILLUSTRATION.

C., the holder of a bill drawn in a set, negotiates the third of exchange to D. Two days afterwards he negotiates the first and second to E. D. can compel E. to deliver up to him the first and second.⁴

¹ Cf. *Holdsworth v. Hunter* (1830), 10 B. & C. 449; *Ralli v. Dennistoun* (1851), 6 Exch. at 496; German Exchange Law, Art. 67.

² Cf. French Code, Art. 148; German Exchange Law, Art. 67; and see *Kearney v. West Grenada Co.* (1857), 1 H. & N. 412.

³ *Perreira v. Jopp* (1793), cited 10 B. & C. at 450: see at 454.

⁴ *Id.*

Right of
holder of
one part.

NOTE.—This Art. is not necessarily inconsistent with Arts. 27 and 29, where the liability of the acceptor or indorser depends on estoppel and is independent of title to the bill. In the case given, E. would not be without remedy. He could get back from C. the money he had given for the bill as money paid for a consideration which had failed, or he could bring an action against C. for false representation.

Acceptance of Bill of Exchange.

Accept-
ance
defined.

Art. 31. "Acceptance" is the assent in due form by the drawee of a Bill of Exchange to the order of the drawer.

Requisites
in form.

Art. 32. The acceptance of a Bill of Exchange must be in writing thereon, and must be signed by or on behalf of the drawee.¹

The mere signature of the drawee without any additional words is a sufficient acceptance.²

Unless the contrary be expressed, the term "acceptance" means an acceptance completed by delivery, or notification to the holder, in order to give effect thereto.³

ILLUSTRATIONS.

1. A. draws a bill on B. B. writes thereon the word "Accepted," but does not sign it. This is not an acceptance.⁴

2. A. draws a bill on B. B. writes a letter to A. promising to pay the bill, and shows the letter to the holder. This is not an acceptance.⁵

3. The drawee of a bill writes an acceptance on the back of it. This is (probably) sufficient.⁶

¹ 19 & 20 Vict. c. 97, § 6; French Code, Art. 122; German Exchange Law, Art. 21. See *post*, p. 266.

² Bills of Exchange Act, 1878, 41 & 42 Vict. c. 13. See *post*, p. 266.

³ *Smith v. McClure* (1804), 5 East, 476; Cf. Art. 53.

⁴ 19 & 20 Vict. c. 97, § 6. See *post*, p. 266.

⁵ *Id.*

⁶ *Young v. Glover* (1857), 3 Jur. N. S. 637, per Ld. Campbell.

NOTE.—As to signature, *see* Art. 49. As to bill in a set, *see* Requisites Art. 28. By German Exchange Law, Art. 21, an acceptance once written cannot be cancelled, and Art. 119 of the Netherlands Code is to the same effect; but in France, as in England, an acceptance may be cancelled by the drawee as long as he retains possession of the bill *quâ* drawee. *See* Art. 53 n. At common law, a verbal acceptance was valid, and the common law still prevails in some of the American States; *e.g.*, Massachusetts and Illinois.¹ The usual mode of accepting is for the drawee to write “accepted” across the face of the bill, and then to sign his name underneath; but the drawee may use any form of words from which the intention to accept can be gathered.² In France the mere signature of the drawee is not sufficient: *Nouguier*, § 490; but German Exchange Law, Art. 21, expressly provides that it shall be sufficient, and it has been held to be sufficient in New York.³ Some of the continental codes (*e.g.*, the Spanish Code) require the precise term “accepted” to be used.

Art. 33. An acceptance need not be dated.

Undated
accept-
ance.

Explanation.—In the case of a Bill of Exchange payable after sight, the acceptance should be dated, but extrinsic evidence is (probably) admissible to show on what date an undated acceptance was given.⁴

NOTE.—French Code, Art. 122, provides that if a bill be payable after sight and the acceptance be not dated, time runs from the date of the bill; but *see* *Nouguier*, § 498. Art. 115 of the Netherlands Code contains a similar provision.

Art. 34. A Bill of Exchange may be accepted—

Time of
accept-
ance.

- (1.) Before it has been signed by the drawer, or while otherwise incomplete;⁵
- (2.) After it is overdue;⁶
- (3.) After it has been dishonoured by a previous refusal to accept, or by non-payment.⁷

¹ *See* *Scudder v. Union Nat. Bank* (1876), 2 Otto, Sup. Ct. U. S., 406; and Art. 59.

² *Cf. Smith v. Virtue* (1860), 30 L. J. C. P., at 60, Byles, J.

³ *Spear v. Pratt* (1842), 2 Hill, 582.

⁴ *Parsons*, 282; and *cf.* Arts. 15, and 158, n.

⁵ *London and S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96, and Art. 23.

⁶ *See* Art. 18 (3).

⁷ *Cf. Christie v. Peart* (1841), 7 M. & W. 491, and Arts. 157, 201 n.

ILLUSTRATIONS.

Time of
accept-
ance.

1. A. draws a bill on B., dated January 1, payable one month after date. The holder presents it for acceptance in March. B. accepts. As regards B. this is a valid acceptance of a bill payable on demand.¹

2. The holder of a bill payable one month after sight presents it to the drawee for acceptance. Acceptance is refused. A week after it is re-presented, and accepted. The acceptance is valid.²

NOTE.—When a bill payable after sight is refused acceptance, and then subsequently accepted, the now uniform practice is to ante-date the acceptance to the day the bill was first presented. This puts the holder in the position in which he would have been if the bill had never been dishonoured.

Presump-
tion as to
time of
undated
accept-
ance.

Art. 35. Unless the contrary appear by its terms a Bill of Exchange is *prima facie* deemed to have been accepted before maturity and within a reasonable time after its issue, but there is no presumption as to the exact time of acceptance.³

ILLUSTRATION.

B. accepts, without dating, a bill drawn payable three months after date. He attains his majority the day before the bill matures. This is *prima facie* evidence that B. accepted it while an infant.⁴

Accept-
ance must
be to pay
money.

Art. 36. An acceptance must not express that the acceptor will perform his contract by any other means than the payment of money.⁵

ILLUSTRATION.

A. draws a bill on B. for 100*l*. B. accepts it, "payable in bills," or "payable in goods." This is invalid.⁶

NOTE.—When the time of payment comes, the holder may, of course, accept goods or bills in satisfaction of the debt due to him.

¹ *Mutford v. Walcot* (1698), 1 *Id.* Raym. 574; Cf. Art. 201 n.

² *Wynne v. Raikes* (1804), 5 *East*, 514.

³ *Roberts v. Bethell* (1852), 12 *C. B.* 778; Cf. Art. 132.

⁴ *Id.*

⁵ *Russell v. Phillips* (1850), 14 *Q. B.* 891; Cf. Art. 10, Expl. 3.

⁶ *Id.*; Cf. *Boehm v. Garcias* (1807), 1 *Camp.* 425.

Art. 37. The acceptance of a Bill of Exchange by any person other than the drawee is invalid.¹ Drawee only can accept.

Exception.—Acceptance for honour. (Art. 42.)

ILLUSTRATIONS.

1. Bill addressed to B. X. writes an acceptance on it. X. is not liable as acceptor.²

2. Bill addressed to B. B. accepts it. X. also writes an acceptance on it. X. is not liable as acceptor.³

3. Bill addressed to the "Directors of the B. Company." The acceptance is signed by two directors and the manager. The manager is not liable as acceptor.⁴

NOTE.—Can a Case of need accept otherwise than *supra protest*? On the Continent he cannot. Byles and Parsons seem to think that under English law he may; but see Chitty on Bills, 10 ed. 114. The uniform practice is for him to accept *supra protest*.

Explanation 1.—When a Bill of Exchange is addressed to two or more drawees jointly, whether partners or not, any one of them may accept so as to bind himself.⁵

ILLUSTRATIONS.

1. A bill is addressed to B. & Co. X., a partner in that firm, accepts it in his own name. He is liable as acceptor.⁶

2. A bill is addressed to B. and X. B. alone accepts. He is liable as acceptor.⁷

NOTE.—In *Mason v. Rumsey*,⁸ a bill was addressed to a firm, and accepted by a partner in his individual name. Held that the firm was bound; but looking at the *ratio decidendi*, it may be doubted whether the case holds good since 19 & 20 Vict. c. 97, § 6, which requires an acceptance to be signed by the acceptor. In America, it has been held that the firm in such case is not bound.⁹

¹ *Steele v. McKinlay* (1880), 5 App. Cas. at 770 and 779 H. L. Sc.; *Malcolmson v. Malcolmson* (1878), 1 Ir. L. R. Ch. D. at 231.

² *Davis v. Clarke* (1844), 6 Q. B. 16.

³ *Jackson v. Hudson* (1810), 2 Camp. 447, cf. *Steele v. McKinlay* (1880), 5 App. Cas. at 770 per Ld. Blackburn.

⁴ *Bull v. Morrell* (1840), 12 A. & E. 745.

⁵ *Owen v. Von Uster* (1850), 10 C. B. 318.

⁶ *Id.*

⁷ *Id.*

⁸ *Mason v. Rumsey* (1808), 1 Camp. 304.

⁹ *Cunningham v. Smithson* (1841), 12 Leigh, 32.

Drawee
only can
accept.

Explanation 2.—A Bill of Exchange may (probably) be accepted by the drawee in any name he chooses to adopt.¹

ILLUSTRATIONS.

1. A bill is addressed to B. His wife accepts it, signing her name "Mary B." B. promises to pay the bill. He is liable as acceptor.²

2. Bill addressed to B., who is a partner in the firm of X. & Co., B. accepts it in the firm name. B. personally is liable as acceptor.³

NOTE.—*Lindus v. Bradwell*¹ was decided before the stat. 19 & 20 Vict. c. 97, § 6; but it has not been questioned here or in America, and it seems to support the proposition submitted in Expl. 2. It may, perhaps, depend somewhat on the peculiar relations of husband and wife.

Explanation 3.—In construing an acceptance, the address to the drawee and the acceptance must be read together.

ILLUSTRATIONS.

1. A bill is addressed to the B. Company, Limited. Two of the directors accept it, signing thus: "X. & Y., directors of the B. Co., Limited." This is an acceptance by the company.⁴

2. A bill is addressed to "J. B., general agent of the X. Company." He accepts it thus: "Accepted on behalf of the company—J. B." J. B. is personally liable as acceptor.⁵

3. A bill is addressed to "X. & Co." The proper style of the firm is "B. X. & Co.," and it is accepted in that name. This is a valid acceptance.⁶

NOTE.—In the case of signatures by agents there is this distinction between a bill and a note. A bill can only be accepted by the drawee; so either the drawee is liable as acceptor, or no one

¹ *Lindus v. Bradwell* (1848), 5 C. B. at 591; Cf. Art. 71, Expl. 2.

² *Id.*

³ *Nicholls v. Diamond* (1853), 9 Exch. 154; Cf. Art. 72, Expl. 3.

⁴ *Okell v. Charles* (1876), 34 L. T. N. S. 822, C. A.

⁵ *Herald v. Connah* (1876), 34 L. T. N. S. 855; *Mare v. Charles* (1856), 5 E. & B. 978. See *contra* an American case, *Laffin v. Sinsheimer* (1877), 30 Amer. R. 472.

⁶ *Lloyd v. Ashby* (1831), 2 B. & Ad. 23.

is liable, and the rule of construction is *ut res magis valeat quam pereat*. When the point arises on a note, the only question is whose signature—is it the signature of the principal or of the agent?¹ Drawee only can accept.

Art. 38. An acceptance may be—(a), General, General or absolute acceptance. or—(b), Qualified.² A General or Absolute acceptance assents without qualification to the order of the drawer. The form of words used is immaterial.³

NOTE.—The holder of a bill is entitled to an absolute acceptance: Art. 158; Cf. Art. 58 as to construction.

Art. 39. A qualified acceptance varies the effect of the bill as drawn; therefore an acceptance is qualified which is, Qualified acceptance.

- (1.) Conditional—i.e., which makes payment by the acceptor dependent on the fulfilment of a condition therein stated.

ILLUSTRATIONS.

1. The drawee of a bill accepts it “Accepted—payable on giving up bills of lading for clover, per ship ‘Amazon.’”⁴
2. Or, “Accepted—payable when in funds.”⁵

- (2.) Partial, or restricted as to amount.

ILLUSTRATIONS.

1. A. draws a bill on B. for 100*l*. B. accepts it as to 50*l*.⁶
2. A. draws a bill on B. for 100*l*. B. accepts it, payable half in money, half in goods. This is valid as a qualified acceptance for 50*l*.⁷

- (3.) Local, or restricted as to place of payment.

¹ Cf. *Alexander v. Sizer* (1869), 4 L. R. Ex. at 105.

² *Rowe v. Young* (1820), 2 Bligh. 391, H. L.

³ Id. See at 454, per Holroyd, J., *Boehm v. Garcias* (1807), 1 Camp. 425.

⁴ *Smith v. Virtue* (1860), 30 L. J. C. P. 56; Cf. *Swan v. Cox* (1814), 1 Marsh 170. *Re Home* (1871), 6 L. R. Ch. 838.

⁵ Id.; and *Julian v. Sherbrooke* (1754), 2 Wils. 9.

⁶ Cf. *Wegersloffe v. Keene* (1709), 1 Stra. 214.

⁷ *Petit v. Benson* (1697), Comberb. 452; Cf. *Rowe v. Young* (1820), 2 Bligh. at 409.

Qualified
accept-
ance.

Explanation.—An acceptance to pay at a particular place is to be deemed a general acceptance, unless it express that the bill is to be paid there only, and not otherwise or elsewhere.¹

ILLUSTRATIONS.

1. B. accepts a bill "payable at Messrs. X. & Co.'s," his bankers. This is a general acceptance.²

2. B. accepts a bill, "payable at Messrs. X. & Co.'s, and not elsewhere." This is a qualified acceptance.³

(4.) Qualified as to time.

ILLUSTRATIONS.

1. A. draws a bill on B., payable two months after date. B. accepts it, payable six months after date.⁴

2. B. accepts a bill drawn on him, "on condition that it be renewed," for six months.⁴

NOTE.—The validity of such an acceptance must of course be subject to the provisions of the Stamp Acts.

(5.) The acceptance of some one or more joint drawees, but not of all.

ILLUSTRATION.

Bill drawn on B., X., and Y. B. accepts. X. and Y. refuse to accept. This is a qualified acceptance.⁵

NOTE.—German Exchange Law, Art. 22, admits a partial acceptance, but makes any other qualification a refusal to accept. French Code, Art. 124, prohibits a conditional, but admits a partial acceptance, directing the holder to protest the bill as to the residue. England and the United States seem to be the only countries that allow of conditional acceptance. Cf. Art. 10; and Art. 271.

Effect of
qualified
accept-
ance.

Art. 40. A Qualified acceptance is valid as re-

¹ 1 & 2 Geo. IV. c. 78, § 1. See Appendl. *post*, p. 263. This statute does not apply to notes: *Emblin v. Dartnell* (1844), 12 M. & W. 830.

² Cf. *Hulstead v. Skelton* (1843), 5 Q. B. 86, Ex. Ch.

³ *Russell v. Phillips* (1850), 14 Q. B. 891; Cf. *Fanshawe v. Peat* (1857), 26 L. J. Ex. 314.

⁴ *Id.*

⁵ *Byles*, 12 ed. p. 186, citing *Marius* 16; New York Draft Code, § 1784; *Nouguier*, § 451.

gards the acceptor and all subsequent parties, and as regards prior parties who assent thereto. A prior party (drawer or indorser) who does not authorize or assent to it is (probably) discharged.¹

Effect of
qualified
accept-
ance.

NOTE.—In *Rowe v. Young*,¹ the judges differed in opinion as to the effect of taking a qualified acceptance without the consent or subsequent assent of prior parties, some thinking that prior parties would only be discharged if it could be shown that their rights were injuriously affected, others thinking that they would be *ipso facto* discharged. See by way of analogy Arts. 248, 249 on Alterations. Suppose the holder takes a qualified acceptance. All admit that he must give notice to the drawer. If the drawer, on receipt of the notice assent, or, perhaps, do not express his dissent, well and good. But is he not entitled to say, "You have altered my contract behind my back, I am no longer a party to it. *Non hæc in fœdera veni*. If the drawee do not in terms assent to my order, I am entitled to notice of dishonour, and notice of dishonour includes a demand of payment. This you cannot give." Can the holder reply, "The drawee is to some extent your agent, and the altered contract was entered into for your benefit?" Surely not. In the Indian trade conditional acceptances are very common. Perhaps in the case of an Indian bill, the recognised usage of the trade may operate as an authority from the drawer to the holder to take a conditional acceptance.

Acceptance for Honour suprâ Protest.

Art. 41. A Bill of Exchange may be accepted for honour *suprâ protest*, which has been—

What bills.

- (1.) Dishonoured by non-acceptance;² or
- (2.) Protested for better security after acceptance.³

Art. 42. Any person, not being a party already liable thereon, may, with the consent of the holder,

Who may
accept for
honour.

¹ *Rowe v. Young* (1820), 2 Bligh. H. L. 391, third question to judges, and answers thereto. Cf. *Whitehead v. Walker* (1842), 9 M. & W. at 509.

² *Mutford v. Walcot* (1698), 1 Ld. Raym. 575; French Code, Art. 126; German Exchange Law, Art. 56.

³ *Ex parte Wackerbath* (1800), 5 Ves. Jr. 574; Cf. Art. 183.

⁴ *Byles*, 12 ed. p. 268; *Chitty*, 13 ed. pp. 243, 244; *Story*, 11 ed. § 122; *Beaves*, No. 37.

Who may
accept for
honour. intervene and accept such bill after protest, for the
honour of the drawer, the drawee, or an indorser.

ILLUSTRATION.

Bill dishonoured by non-acceptance. The drawee, or a stranger to the bill, may accept it for the honour of the drawer or an indorser.²

NOTE.—In France and Germany the rule is that if two or more persons are willing to accept *suprà protest*, the holder must take the acceptance of the person whose payment will enure for the benefit of most parties.³ Beaves, No. 42, says that if a bill be accepted for the honour of an indorser, there may be another acceptance *suprà protest* for the honour of any party prior to him. This is not resorted to in practice ; but if the acceptor *suprà protest* fails before the maturity of the bill, a second acceptance *suprà protest* is sometimes obtained.

Holder's
option.

Art. 43. It is optional with the holder to take or refuse an acceptance *suprà protest*.⁴

Exception.—When the drawer of a foreign bill gives a reference to a Case of need, and by the law of the place where such bill is drawn presentment to the Case of need is obligatory, the holder (perhaps) cannot refuse to take the acceptance *suprà protest* of such Case of need.⁵

NOTE.—By German Exchange Law, Art. 57, if the bill contain a reference to a Case of need, the holder is bound to present the bill to him ; in other cases he may refuse acceptance *suprà protest*. Under French Code, Art. 126, the holder, perhaps, cannot in any case refuse, and Dutch law appears to be the same. See Netherlands Code, Arts. 121—125. In England an immediate right of recourse accrues to the holder when a bill is dishonoured by non-acceptance. On the Continent he must wait till it is dis-

¹ *Hoare v. Cazenove* (1812), 16 East, 391 ; French Code, Art. 125 ; German Exchange Law, Art. 56—61.

² *Beaves*, No. 32 ; *Nouguier*, § 574.

³ *Nouguier*, § 575 ; German Exchange Law, Art. 56 ; Netherlands Code, Art. 122.

⁴ *Byles*, p. 266 ; *Chitty*, pp. 243, 244 ; *Story* ; *Beaves*, No. 37 ; *Mutford v. Walcot* (1699), 12 Mod. 410.

⁵ Cf. Art. 184.

honoured by non-payment, and in the meantime can only demand Holder's security from the drawer and indorsers. Hence, perhaps, the option. English rule that the holder may refuse to take an acceptance *suprà protest*, which would have the effect of postponing his right of recourse.

Art. 44. An acceptance *suprà protest* may be given at any time after the bill has been protested and before it is over-due. Time of acceptance for honour.

Explanation.—A bill noted for protest is deemed to be protested.¹

ILLUSTRATION.

Bill payable one month after sight is protested for non-acceptance. It may be accepted *suprà protest* eight days afterwards.²

NOTE.—In France, perhaps, the acceptance for honour must be given at the time the bill is protested: *Nouguier*, § 570.

Art. 45. An acceptance *suprà protest* must be in writing on the bill, signed by the acceptor, and duly attested by a notarial act of honour.³ Form of acceptance for honour.

ILLUSTRATION.

The acceptor for honour writes on the bill, "Accepted *suprà protest* for the honour of C., and will be paid at my office if regularly presented when due;" or, "Accepted under protest for the honour of A., and will be paid for his account if refused when due and regularly protested."⁴ Or simply, "Accepted, S. P." He then signs.

NOTE.—By German Exchange Law, Art. 58, the acceptance *suprà protest* is to be recorded in an appendix to the protest. By French Code, Art. 126, the acceptance *suprà protest* must be recorded in the protest, and the protest signed by the acceptor: Cf. *Nouguier*, § 570. In England the notarial act, in this case called an "act of honour," is appended to the protest. A "notarial act" means "any instrument, indorsement, note, or entry made or signed by a notary public in the execution of the duties of his office."⁵ It was formerly

¹ *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105.

² Cf. *Williams v. Germaine* (1827), 7 B. & C. 468.

³ *Byles*, p. 265; *Chitty*, p. 244; *Story*; *Brooks' Notary*, 4 ed., p. 93.

⁴ Cf. *Mitchell v. Baring* (1829), 10 B. & C. 4.

⁵ Indian Stamp Act, 1870, § 3.

Form of acceptance for honour. the practice for the acceptor *suprà protest* to appear personally before the notary with witnesses, to declare for whose honour he accepted. Modern custom no longer requires this.¹ A clerk is usually sent to the notary.

Partial acceptance for honour. Art. 46. There may be an acceptance *suprà protest* for part of the amount of the bill.²

Presumption. Art. 47. An acceptance *suprà protest* should state for whose honour it is given. If it do not, it is deemed to be given for the honour of the drawer.³

Effect of acceptance for honour. Art. 48. An acceptance *suprà protest* (probably) suspends until non-payment the holder's right of action, which arises on non-acceptance.⁴

NOTE.—Query, if in some cases the right of action be not taken away and not merely suspended, but the point has not been judicially discussed. On payment *suprà protest*, or dishonour at maturity, new rights and obligations arise: Cf. Art. 244. By French Code, Art. 128, the holder's rights against the drawer and indorsers are not affected by an acceptance *suprà protest*; but then the holder has no right of action until the maturity of the bill: he can only demand security: Cf. Art. 157. By German Exchange Law, Art. 61, the holder is entitled to demand security from parties prior to the party for whose honour the acceptance is given. Art. 127 of the Netherlands Code provides that "he who accepts a bill for honour is bound to inform without delay the person for whose honour he has done so, under penalty of costs, damages, and interest as circumstances may warrant."

Signature.

Sufficiency in form. Art. 49. "Signature" means the writing of a person's name on a bill, in order to authenticate and give effect to some contract thereon. (Cf. Art. 52.)

Explanation.—A signature sufficient in point of

¹ *Brooks' Notary*, 4 ed., p. 94.

² *Id.*, p. 97.

³ *Chitty*, p. 243; *Daniell*, § 525; German Exchange Law, Art. 59; *Nouguier*, § 578.

⁴ Cf. *Williams v. Germaine* (1827), 7 B. & C. at 477; *Chitty*, p. 238.

form in the case of an ordinary contract is (perhaps) sufficient in the case of a bill. Sufficiency
in form.

ILLUSTRATIONS.

1. A signature in pencil is sufficient.¹
2. A lithographed signature, or a signature impressed with a stamp, is (perhaps) sufficient.²
3. A note in the form, "I, J. B., promise, *et cet.*," is sufficiently signed, though the usual form is "I promise, *et cet.*," signed J. B.³
4. Bill drawn in the form, "Mr. A. requests Messrs. B. & Co., *et cet.*" This is (probably) a sufficient signature by the drawer.⁴
5. A bill under seal, without signature, is not sufficiently signed, unless the contrary be provided by statute.⁵
6. A signature made by another person, but attested by mark, is sufficient.⁶

NOTE.—When a statute requires a document to be signed, a mere mark,⁷ or initials,⁸ or a stamp,⁹ if intended as signatures, are sufficient; and it is immaterial in what part of the document the name is introduced, provided it govern the whole. But legal analogies must be applied with caution to bills which are the creation of custom, and where it is of the utmost importance that a clear title should appear on the face of the instrument. In America the rule is lax. A person who signed by initials was held liable as indorser of a cheque,¹⁰ and the same was held as to a person who indorsed by mark, viz., by writing the figures 1, 2, 3.¹¹ By German Exchange Law, Art. 94, signature by mark is insufficient unless made before a notary.

Art. 50. A corporation is bound by its signature Signature
of corpora-
tion or
company.

¹ *Geary v. Physic* (1826), 5 B. & C. 234.

² Cf. *Ex parte Birmingham Banking Co.* (1868), 3 L. R. Ch. at 653, 654.

³ *Taylor v. Dobbin* (1719), 1 Stra. 399.

⁴ Cf. *Ruff v. Webb* (1794), 1 Esp. 129. As to documents other than bills, *Caton v. Caton* (1867), 2 L. R. H. L. at 143.

⁵ *Byles*, p. 68; *Story*, § 61; Cf. Art. 278. Note of Corporation. As to a kind of bond formerly known as a "single bill" or "bill under seal," and sometimes confused with a bill of exchange, see *Bank of England v. Anderson* (1837), 3 Bing. N. C. at 621 and 658.

⁶ *George v. Surrey* (1830), M. & M. 516.

⁷ *Baker v. Dening* (1838), 8 A. & E. 94.

⁸ *Caton v. Caton* (1867), 2 L. R. H. L. 143.

⁹ *Saunderson v. Jackson* (1800), 2 B. & P. 238.

¹⁰ *Merchants' Bank v. Spicer* (1831), 6 Wend. 443.

¹¹ *Brown v. Butchers' Bank* (1844), 6 Hill, 443.

Signature of corporation or company. to a bill, without the addition of the corporate seal.¹

NOTE.—This is one of the exceptions to the general rule, that a corporation can only bind itself by an instrument under seal: *Grant on Corp.*, p. 61. The usual form of signature for a corporation is a procuration signature. Cf. Art. 278, as to note under Seal. As regards companies under the Companies Acts, 1862 to 1879, the form in which a bill or note must be drawn, made, indorsed, or accepted so as to bind the company is regulated by s. 47 of the Companies Act, 1862. See that section set out in Appendix, *post*, p. 267, and cases thereon. In order to determine whether a company or other corporation is liable on a bill, three questions must be asked: 1. Has the company the requisite capacity to bind itself by a bill? 2. Is the signature on the bill sufficient in form to bind the company? 3. Was the signature placed there by a person having authority to sign bills for the company? It is immaterial that a person who acts within the scope of his authority in signing bills exceeds or contravenes private instructions.² See also Art. 75, and note.

Liquidators.

Art. 51. When a company, under the Companies Acts, is in liquidation, and two or more liquidators are appointed, a bill must be signed by at least two liquidators in order to bind the company.³

Unintentional signature.

Art. 52. When a person is induced by fraud to sign a bill under the belief that he is signing a wholly different instrument, his signature is null and void, provided that in so signing he acted without negligence.⁴

ILLUSTRATIONS.

1. D., an old man with enfeebled sight, is induced to sign his name on the back of a bill, by being told that it is a railway guarantee which he had promised to sign. The bill is negotiated to a *bond fide* holder. D. is not liable as an indorser.⁵

¹ Cf. *Crouch v. Crédit Foncier* (1873), 8 L. R. Q. B. at 382.

² *Re Land Credit Co.* (1869), 4 L. R. Ch. 460. As to the powers of *de facto* directors, Cf. *Mahony v. East Holyford Co.* (1875), 7 L. R. H. of L. 869.

³ *Ex parte Agra Bank* (1871), 6 L. R. Ch. 206.

⁴ *Foster v. Mackinnon* (1869), 4 L. R. C. P. 704; *Briggs v. Exart* (1873), 11 Amer. R. 445.

⁵ *Id.*; Cf. *Société Générale v. Met. Bank* (1873), 27 L. T. N. S. 849.

2. B. is induced, by fraud, to sign a negotiable note as maker, believing it to be a non-negotiable note for a less sum. It is negotiated to a *bond fide* holder. Negligence is negatived. B. (probably) is not liable.¹

NOTE.—Frauds of this sort are more common in America, owing to the absence of stamp laws. A man's signature is obtained for some pretended purpose, and then a promissory note is over-written.

Delivery.

Art. 53. Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument, in order to give effect thereto.²

"Delivery" means transfer of possession, actual or constructive, from one person to another.

Exception.—Where an acceptance is written on a bill, and the drawee intimates to the holder that he has accepted it, the acceptance (perhaps) becomes thereupon complete and irrevocable.³

ILLUSTRATIONS.

1. B., who is indebted to C., makes a note for the amount payable to C. B. dies, and the note is afterwards found among his papers. C. has no right to this note, and if it be given to him he cannot enforce it.⁴

2. B. makes a note in favour of C., and delivers it to a stakeholder (*e.g.*, trustee under composition deed). C. thereby acquires no property in the note.⁵

3. C., the holder of a bill, specially indorses it to D.; C. transmits it by post to X., his own agent. X. informs D. that he has received the bill, but does not give it him or undertake to hold it

¹ *Griffiths v. Kellog* (1876), 20 Amer. R. 48.

² Cf. *Abrey v. Cruz* (1869), 5 L. R. C. P. at 42.

³ *Cox v. Troy* (1822), 5 B. & Ald. 474.

⁴ Cf. *Bromage v. Lloyd* (1847), 1 Exch. 32.

⁵ Cf. *Latter v. White* (1872), 5 L. R. H. L. 578.

Delivery on his account. C. can revoke the transaction and cancel his indorsement to D.¹

4. C., the holder of a bill, specially indorses it to D., and incloses it in a letter addressed to D. The letter, which is put in the office letter-box, is stolen by a clerk of C.'s, who forges D.'s indorsement and negotiates the bill. The property in the bill remains in C.²

5. By the regulations of the English Post-office, a letter once posted cannot be reclaimed. If, then, the indorsee of a bill authorise the indorser to transmit it to him by post, the property in the bill passes to the indorsee, and the indorsement becomes complete as soon as the letter which contains the bill is posted.³

6. C., the holder of a note payable to bearer, wishes to remit money to D. For safety of transmission he cuts the note in half and posts one half to D. Before he posts the second half he changes his mind, and writes to D. demanding back the half he has sent. He is entitled to do so, for a partial delivery is ineffectual.⁴

7. A bill is left with the drawee for acceptance. The drawee writes an acceptance on it. The next day the holder calls for the bill: he is merely informed that it is mislaid, and is requested to call the next day. In the meantime the drawee hears that the drawer has failed. He accordingly cancels his acceptance, and the next day delivers the dishonoured bill back to the holder. This is no acceptance; the drawee was entitled to cancel it.⁵

8. A firm is indebted to D. X., who is a partner in the firm, and also agent for D., writes the firm's indorsement on a bill held by the firm, and puts the bill with some other papers of D.'s, of which he has the custody. This is a valid indorsement by the firm, and the property in the bill passes to D.⁶

NOTE.—In Illustration 8 delivery is effected by transfer of the

¹ *Brind v. Hampshire* (1836), 1 M. & W. 365; *Muller v. Pondir* (1873), 55 New York R. 325.

² Cf. *Arnold v. Cheque Bank* (1876), 1 C. P. D. at 584.

³ *Ex parte Cole* (1873), 9 L. R. Ch. 27; *Sichel v. Birch* (1864), 2 H. & C. 956. Query, if there be no authority to send by post?

⁴ *Smith v. Mundy* (1860), 29 L. J. Q. B. 172; Cf. *Redmayne v. Burton* (1860), 2 L. T. N. S. 324.

⁵ *Bank of Van Diemen's Land v. Victoria Bank* (1871), 3 L. R. P. C. 526.

⁶ *Lysaght v. Bryant* (1850), 9 C. B. 46.

constructive possession, i.e., the actual possession remains un-^{Delivery} altered, but it is continued in a different right. A person has the ^{necessary.} constructive possession of a thing when it is in the actual possession of his servant or agent on his behalf; therefore delivery may be effected without change of actual possession, in three cases: 1. A bill is held by C. on his own account: he subsequently holds it as agent for D. 2. A bill is held by C.'s agent, who subsequently attorns to D., and holds it as his agent. 3. A bill is held by D. as agent for C.; he subsequently holds it on his own account.¹ There is this difference between an acceptance and the other contracts on a bill. The drawee has no property in the bill, therefore an attornment to the holder will be presumed on slight evidence, perhaps the mere intimation by the drawee of the fact that the acceptance has been written.²

Art. 54. As between immediate parties, and as ^{Delivery} regards a remote party affected with notice, delivery ^{by whom.} in order to be effectual must be made by the obligor or his agent.

ILLUSTRATIONS.

1. The holder of a bill, specially indorses it to D., and dies before delivering it, but his executor subsequently hands the bill to D. The indorsement to D. is invalid, for an executor is not the agent of his testator. D. cannot sue on the bill.³

2. X., by means of a false pretence, or a promise or condition which he does not fulfil, procures A. to draw a cheque in favour of C. X. delivers it to C., who receives it *bonâ fide* and for value. C. acquires a good title, and can sue A., for X. is ostensibly A.'s agent.⁴

3. A. draws a cheque payable to bearer, intending to pay it to X. It is stolen from his desk before he issues it, and is subsequently

¹ Cf. in illustration *Field v. Carr* (1828), 2 M. & P. 46; *Bosanquet v. Forster* (1841), 9 C. & P. 659; *Belcher v. Campbell* (1845), 8 Q. B. 1. Cf. also *Ancona v. Marks* (1862), 31 L. J. Ex. 163, ratification of delivery; *Ex parte Cote* (1873), 9 L. R. Ch. 27, delivery by mistake and revocation by consent.

² Cf. *Cox v. Troy* (1822), 5 B. & Ald. 474; approved *Chapman v. Cottrell* (1865), 3 H. & C. 857; Art. 32 n., Foreign Laws.

³ *Bromage v. Lloyd* (1847), 1 Exch. 32. See this case distinguished, *Giddings v. Giddings* (1878), 31 Amer. R. 682.

⁴ Cf. *Watson v. Russel* (1862), 3 B. & S. 34; affirmed 5 B. & S. 968, Ex. Ch.

Delivery by whom. negotiated to C., who takes it for value and without notice. C. (probably) acquires a good title and can sue A.¹

Condi-
tional de-
livery. Art. 55. As between immediate parties, and as regards a remote party affected with notice,² a bill may be shown to have been delivered conditionally, or for a special purpose only, and not for the purpose of transferring the entire property therein.³

ILLUSTRATIONS.

1. B. makes a note payable to C., who sues him on it. B. can defend himself by showing that the note was delivered to C. on condition that it was only to operate if he should procure B. to be restored to a certain office, and that B. was not so restored.⁴

2. C., the holder of a bill, indorses it in blank and hands it to D. on the express condition that he shall forthwith retire certain other bills therewith. He does not do so. D. cannot sue C., and if he sue the acceptor, the latter may set up the *jus tertii*.⁵

3. C., the holder of a bill, indorses it specially to D. in order that he may get it discounted for him. D., in breach of trust, negotiates the bill to E. If he take the bill *bonâ fide* and for value, he acquires a good title, and can sue all the parties thereto. If he do not so take it, he cannot sue C.; and if he sue the acceptor, the latter may set up that the bill is C.'s;⁶ further, C. can bring an action against E. to recover the bill or the proceeds.⁷

4. C., the payee of a bill, indorses it to D. D. sues C. as indorser. C. may show that he and D. were jointly interested in the bill, and that he indorsed to the latter to collect on joint account.⁸

¹ *Ingham v. Primrose* (1859), 7 C. B. N. S. at 85; *Kinyon v. Wohlford* (1872), 10 Amer. R. 165; but cf. *Baxendale v. Bennet* (1878), 3 Q. B. D. 531 C. A.

² See Art. 88 as to remote and immediate parties.

³ Cf. *Druiff v. Parker* (1868), 5 L. R. Eq. at 137; *Salmon v. Webb* (1852), 3 H. L. Ca. at 518; *Benton v. Martin* (1873), 52 New York R. at 574.

⁴ *Jefferies v. Austin* (1725), 1 Stra. 674.

⁵ *Bell v. Lord Ingestre* (1848), 12 Q. B. 317; Cf. *Seligman v. Huth* (1877), 37 L. T. 488.

⁶ *Lloyd v. Howard* (1850), 15 Q. B. 995; and cf. *Barber v. Richards* (1851), 6 Exch. 63.

⁷ *Goggerly v. Cuthbert* (1806), 2 N. R. 170; Cf. *Alsager v. Close* (1842), 10 M. & W. 576; *Mutty Loll v. Dent* (1853), 8 Moore, P. C. 319.

⁸ *Denton v. Peters* (1870), 5 L. R. Q. B. 475.

5. B. makes a note for 100*l.* payable to C. or order. C. sues B. Evidence is admissible to show that the note was given as collateral security for a running account, and what the state of that account is.¹ Conditional delivery.

NOTE.—Where the person to whom a bill is delivered conditionally or for a special purpose misappropriates it, the true owner may sue that person or any one else who takes it from him with notice of the facts for the conversion of the bill,² or if the bill has been collected the true owner may waive the tort and sue for the proceeds as money received to his use.³

Escrow.—A deed delivered conditionally is called an escrow, and by analogy the term is sometimes applied to bills. There is, however, this distinction: a deed cannot be delivered conditionally to the obligee, the delivery must be to a third party.⁴ When a bill is delivered conditionally or for a special purpose, the relations between the person who so delivers it and the person to whom it is delivered are substantially those of principal and agent.⁵ The person to whom it is delivered belongs, perhaps, to the class of agents called bailees;⁶ at least, if the terms bailor and bailee be used in the extensive sense given to them by Story, in his work on Bailments.

Construction.

Art. 56. The contracts on a bill, as interpreted by the Law Merchant, are contracts in writing. Parol evidence is not admissible to contradict or vary their effect.⁷ Bills are contracts in writing.

Explanation.—Evidence is admissible to impeach the consideration between immediate parties.⁸

¹ Cf. *Ex parte Twogood* (1812), 19 Ves. 227; *Re Boys* (1870), 10 L. R. Eq. 467, and Art. 84.

² *Goggerley v. Cuthbert* (1806), 2 N. R. 170; *Alsager v. Close* (1842), 10 M. & W. 576.

³ *Arnold v. Cheque Bank* (1878), 1 C. P. D. at 585. See *Mutty Loll v. Dent* (1853), 8 Moore, P. C. 319.

⁴ Per Lord Denman, in *Bell v. Ingestre* (1848), 12 Q. B. at 319.

⁵ *Maguire v. Dodd* (1859), 9 Ir. Ch. 452.

⁶ Cf. *Lloyd v. Howard* (1850), 15 Q. B. at 1000, Erle, J.; *Manley v. Boycot* (1853), 2 E. & B. at 56, Ld. Campbell.

⁷ *Abrey v. Cruz* (1869), 5 L. R. C. P. 37; *Maillard v. Page*, 5 L. R. Ex. at 319.

⁸ *Abrey v. Cruz*, at 45. See Art. 14, and Chap. III.

Bills are
contracts
in writing.

Exception.—The obligations of the parties to a bill may be released verbally and without consideration : Art. 239.

ILLUSTRATIONS.

1. The mere signature of the holder on the back of a bill (indorsement in blank) is a contract in writing to this effect :
1. I hereby assign this bill to bearer. 2. I hereby undertake that if the bearer duly present this bill, and it is not honoured, I, on receiving due notice, will indemnify him.¹

2. A. draws a bill in favour of C., and issues it to him for value. A. thereby incurs the ordinary obligations of a drawer. If the bill be dishonoured and C. sue A., oral evidence cannot be admitted to show that A.'s liability as drawer was conditional on the performance of certain acts by C., and that C. had not done them.²

3. Bill drawn in ordinary form. Action by payee against acceptor. Evidence is not admissible to show that it was intended to be paid out of a particular fund which is no longer available.³

4. Bill drawn conditionally (Art. 10). Evidence is not admissible to show that the condition has been performed, and that therefore the bill is no longer conditional and invalid. A bill must be valid *ab initio*.⁴

5. B. makes a note payable to C. one month after date. C. sues B. Parol evidence is not admissible to show that it was intended to be payable two months after date.⁵

6. B. makes a note in favour of C. for 100*l*. C. sues B. Parol evidence is not admissible to show that the sum agreed to be paid was 80*l*.⁶

7. Bill drawn and accepted in the ordinary form. Parol evidence is admissible to show that the holder knew that the bill was accepted for the accommodation of the drawer, and that he gave time to the drawer, thereby discharging the acceptor, whom he knew to be a mere surety.⁷

¹ Cf. *Susc v. Pompe* (1861), 30 L. J. C. P. 75, at 80.

² *Abrey v. Cruz* (1869), 5 L. R. C. P. 37 ; Cf. Art. 239.

³ *Campbell v. Hodgson* (1819), Gow. 74 ; Cf. *Richards v. Richards* (1831), 2 B. & Ad. at 454, 455.

⁴ *Colehan v. Cooke* (1793), Willes, 397.

⁵ Cf. *Drain v. Harvey* (1855), 17 C. B. 257.

⁶ Cf. *Besant v. Cross* (1851), 10 C. B. 895.

⁷ *Ewin v. Lancaster* (1865), 6 B. & S. 571 ; *Overend v. Oriental Finan.*

8. Bill drawn in the ordinary form, payable to drawer's order, and accepted. D. writes his name on the back. Parol evidence is not admissible to show that he intended thereby to guarantee the payment of the bill to the drawer. The Statute of Frauds requires such a guarantee to be in writing and signed.¹ Bills are contracts in writing.

NOTE.—This Art. is not inconsistent with Art. 55. The distinction is this. Evidence is admissible to show that what purports to be a complete contract in writing is merely an inchoate transaction; but evidence is not admissible to vary the terms of an existing and complete contract in writing. The difficulty is to determine within which class a given transaction falls.² As between immediate parties a contemporaneous writing,³ or a subsequent written agreement,⁴ may control the effect of a bill, subject to the same conditions that would be requisite in the case of an ordinary contract; but the mere fact that a bill refers to a collateral writing or agreement which is conditional in its terms, will not vitiate the bill in the hands of a person who has no notice of its contents.⁵ See English and American cases reviewed: *Taylor v. Curry* (1871), 109 Massachusetts, 36. Cf. also Art. 9 and Art. 14.

Art. 57. Questions relating to bills, when not concluded by authority, are to be determined by the usage of trade, if such there be.⁶ Custom of trade.

Explanation 1.—The existence, nature, and scope of a given usage is a question of fact.⁷

Explanation 2.—A general usage once incorporated into a judicial decision becomes part of the Law Merchant, and evidence of custom to contradict it is inadmissible.⁸

Corp. (1874), 7 L. R. H. L. 348; *Hubbard v. Gurney* (1876), 64 New York R. 457; Cf. Art. 245.

¹ *Steele v. McKinlay* (1880), 5 App. Cas. 754 H. L.

² E.g., compare the facts in *Abrey v. Cruz* (1869), 5 L. R. C. P. 37, with those in *Holmes v. Kidd* (1858), 3 H. & N. 891, Ex. Ch.

³ Cf. *Brown v. Langley* (1842), 4 M. & Gr. 466; *Salmon v. Webb* (1852), 3 H. L. Ca. 510; *Maillard v. Page* (1870), 5 L. R. Ex. 312, at 319.

⁴ *McManus v. Bark* (1870), 5 L. R. Ex. 65.

⁵ *Jury v. Baker* (1858), E. B. & E. 459.

⁶ *Goodwin v. Roberts* (1875), 10 L. R. Ex. 337, Ex. Ch.

⁷ *Id.*

⁸ *Id.* at 357; and Cf. *Brandao v. Barnett* (1846), 3 C. B. at 530, H. L.

Custom of
trade.

ILLUSTRATIONS.

1. Bill indorsed "Pay C.," omitting the words "or order." The Court of King's Bench having decided that such bills are still negotiable by indorsement, evidence that by custom they are not negotiable is inadmissible.¹

2. If a foreign bill be dishonoured, the indorser is by the Law Merchant liable for the re-exchange. Evidence that by local custom the holder is entitled either to the re-exchange or to the amount he gave for the bill, at his option, is inadmissible.

3. Action by customer against banker for not honouring a cheque. The banker may show that the cheque was marked "post dated," and that it is the custom of bankers in the City of London not to honour cheques which are marked post dated.²

NOTE.—*Goodwin v. Robarts* (1875),⁴ is important as showing that the novelty of a general usage is no objection to its being incorporated into the Law Merchant, thereby to some extent overruling *Crouch v. Crédit Foncier* (1873), 8 L. R. Q. B. at 386. A particular or local usage must, it is conceived, be proved *de novo* each time. When both authority and custom are silent, foreign law is usually resorted to as a guide. See Intro., p. viii.

Construed
favourably

Art. 58. When the terms of a bill are ambiguous, the construction most favourable to the full validity of the instrument must be followed.⁵

ILLUSTRATIONS.

1. An acceptance will, if possible, be construed as absolute, not qualified, and a mere memorandum, inconsistent with such construction, is to be rejected as being no part of the acceptance.⁶

2. The address to the drawee will be read in with the acceptance, *ut res magis valeat*.⁷

3. Note in the form, "I promise not to pay." The word "not" will be rejected.⁸

¹ *Edie v. East India Co.* (1761), 2 Burr. 1216.

² *Suse v. Pompe* (1860), 30 L. J. C. P. 75.

³ *Emmanuel v. Robarts* (1868), 9 B. & S. 121.

⁴ 10 L. R. Ex. 337. Affirmed by House of Lords, 1 L. R. Ap. Ca. 476.

⁵ *Mare v. Charles* (1856), 5 E. & B. at 981, *Id.* Campbell.

⁶ *Fanshawe v. Peat* (1857), 26 L. J. Ex. 314; and cf. *Stone v. Metcalfe* (1815), 4 Camp. 217; *Fitch v. Jones* (1855), 5 E. & B. at 246.

⁷ *Mare v. Charles* (1856), 5 E. & B. 978.

⁸ *Russel v. Langstaffe*, cited *Bayley on Bills*, 6; and 2 *Atkyns*, 32.

4. Indorsement in the form, "Pay B., or order, value in account with X." This is not to be construed as restrictive.¹ Construed favourably

5. Holder may treat an ambiguous instrument either as a bill or as a note at option.²

6. Instrument invalid as a bill for not designating a drawee. If it be accepted, the holder may treat it as a note.³

Conflict of Laws.

Art. 59. The validity of a bill as regards requirements in form is (generally) determined by the law of the place of issue, and the formal validity of supervening contracts, such as acceptance or indorsement, is (generally) determined by the law of the place where such contract is made.⁴ Formal requisites.

ILLUSTRATIONS.

1. By German law a bill need not express the value received. By French law it must. A bill drawn in Germany on Paris, expressing no value, is (probably) valid everywhere.

2. By the law of Illinois a verbal acceptance is valid. By the law of Missouri an acceptance must be in writing. A bill drawn in Illinois on St. Louis, in Missouri, payable there, is verbally accepted in Illinois. The acceptance is valid everywhere.⁵

3. By French law a bill must not be drawn and payable in the same place. A bill, issued in France, is both drawn and payable in Calais. It is indorsed and sued on in England. It is (probably) invalid.⁶

Exception.—When a bill drawn and payable in one country is negotiated in another, it is sufficient

¹ *Murrow v. Stuart* (1853), 8 Moore, P. C. at 276.

² *Edis v. Bury* (1827), 6 B. & C. 433.

³ *Fielder v. Marshall* (1861), 30 L. J. C. P. 158; Cf. Arts. 37 and 274.

⁴ Cf. *Guepratte v. Young* (1851), 4 De G. & S. 217; German Exchange Law Art. 85; *Nouguier*, § 1417—1427.

⁵ *Scudder v. Union Bank* (1875), 1 Otto, Sup. Ct. U.S. 406.

⁶ Cf. *Bradlaugh v. De Rin* (1868), 3 L. R. C. P. at 542; *Bristol v. Sequerville* (1850), 5 Exch. 275; *sed contra Wynne v. Jackson* (1826), 2 Russ. 351 and 634.

Formal
requisites, if the negotiation be valid in point of form according to the law of the former.¹

ILLUSTRATIONS.

1. An English note, payable to bearer, is negotiated by delivery in a country where this mode of transfer is not recognised. The title passes by such delivery.²

2. Foreign bonds payable to bearer pass by delivery in England, though by English law such a bond would not be assignable.³

NOTE.—The contract is made where delivery is effected, not where the signature is affixed.⁴ A few foreign writers, among them Savigny, are of opinion that the maxim *locus regit actum* is purely facultative, never disabling. German Exchange Law, Art. 85, has gone a long way towards adopting this view. How far does the nationality of the parties enter into the question? Suppose an Englishman abroad draws a bill payable in England, sufficient in form according to English law, but defective according to the law of the place where it is drawn. Would it not be valid in England? It would, it seems, be valid in Scotland.⁵ But if a bill bearing date from London was issued in France, it would probably be sufficient if it conformed to the formal requisites of English law. At present the law must be regarded as unsettled.

Interpre-
tation.

Art. 60. Except as hereinafter mentioned, the interpretation of the drawing, indorsement or acceptance of a bill is (generally) determined by the law of the place where such contract is made.

ILLUSTRATIONS.

1. Action in England on a bill drawn and payable in France and there indorsed in blank. The effect of such indorsement is determined by French law, i.e., it operates as a procuration.⁶

2. A general acceptance given in Paris is (probably) to be interpreted according to French law.⁷

3. Note made and payable in Scotland, in the form, "Pay C.

¹ Cf. *Bradlaugh v. De Rin* (1868), 3 L. R. C. R. at 542.

² *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385.

³ Cf. *Crouch v. Crédit Foncier* (1873), 8 L. R. Q. B. at 384.

⁴ *Chapman v. Cottrel* (1865), 34 L. J. Ex. 186.

⁵ *Stewart v. Gelot* (1871), 9 M. 1057.

⁶ *Trimby v. Vignier* (1834), 1 Bing. N. C. 151; Cf. *Nouguier*, §§ 747—760.

⁷ Cf. *Don v. Lipmann* (1837), 5 Cl. & F. at 12 and 13; Cf. *Wilde v. Sheridan* (1852), 21 L. J. Q. B. 263.

100l.," without adding the words "or order." By Scotch law such a note is negotiable, though by English law it is not. C., in England, can negotiate it by indorsement.¹ Interpretation.

4. A bill drawn in Belgium on England is indorsed in France in blank. The indorsement is (perhaps) to be interpreted according to French law.²

Exception 1.—When an inland bill (Art. 24) is indorsed abroad, the indorsement is to be interpreted according to English law.³

Exception 2.—When a bill is drawn in one country and payable in another, expressions as to time and mode of payment are interpreted by the law of the place of payment.⁴

NOTE.—In *Bradlaugh v. De Rin* (1870), 5 L. R. C. P. 473, the Exchequer Chamber held that in the court below, and also in *Lebel v. Tucker*, and *Trimby v. Vignier*, the French law had been mistaken, and that as regards the point raised—i.e., the right of an indorsee under a blank indorsement to sue in his own name—there was no conflict between the laws of France and England, but the principles laid down in those cases are not questioned.

Exception 3.—Where a Bill of Exchange is accepted in one country payable in another, the acceptance is (probably) to be interpreted according to the law of the place of payment.⁵

¹ *Robertson v. Burdekin* (1843), 1 Ross, Scotch L. C. 824.

² *Bradlaugh v. De Rin* (1868), 3 L. R. C. P. 538, per Bovill, C. J., and Willes, J., *contra* M. Smith, J., and *Everett v. Vendryes* (1859), 19 New York R. 436.

³ *Lebel v. Tucker* (1867), 3 L. R. Q. B. 77.

⁴ Arts. 13 and 20. See, too, the duties of the holder : Arts. 180, 202.

⁵ Cf. *Cooper v. Waldegrave* (1840), 2 Beav. 282, measure of damages.

CHAPTER II.

CAPACITY AND AUTHORITY OF PARTIES TO A BILL.

Capacity.

General
rule.

Art. 61. Capacity to incur liability as a party to a bill is coextensive with capacity to trade and incur trade debts :

Capacity to indorse a bill for the purpose of authorizing the payment thereof, and transferring the property therein, is coextensive with capacity to sell or transfer personal property.

Explanation.—The incapacity of one or more of the parties to a bill does not diminish the liability of the other parties thereto.¹

NOTE.—Capacity must be distinguished from authority. Capacity means power to contract so as to bind oneself. Authority means power to contract on behalf of another so as to bind him. Capacity to contract is the creation of law. Authority is derived from the act of the parties themselves. Want of capacity is incurable. Want of authority may be cured by ratification. Capacity or no capacity is a question of law. Authority or no authority is usually a question of fact. Again, capacity to incur liability must be distinguished from capacity to transfer. An executed contract is often valid where an executory contract cannot be enforced: Cf. Arts. 111, 112.

Clergy-
man.

Art. 62. A clergyman, though liable to penalties for trading, has full capacity to contract by bill.²

¹ *Grey v. Cooper* (1782), 3 Dougl. 65 ; French Code, Art. 114 ; German Exchange Law, Art. 3.

² Cf. 1 & 2 Vict. c. 106, §§ 29, 31.

ILLUSTRATION.

B., a clergyman, makes a note in respect of a trade debt. The Clergyman.
note is valid in the hands of a holder with notice.¹

Art. 63. An infant incurs no liability by drawing, Minor's
indorsing, or accepting a bill.² liability.

ILLUSTRATIONS.

1. B., an infant within three months of attaining his majority, accepts a bill payable six months after date. He ratifies the transaction on attaining his majority, and the bill is negotiated. B. is not liable on his acceptance.³

2. B., after attaining his majority, accepts a bill to pay a debt contracted before his majority. The bill is indorsed to a holder for value. The holder can sue B.⁴

Exception.—An infant who represents himself to be of full age, and thereby induces any person to deal with him, is not allowed to set up his infancy as a defence to a liability thus incurred.⁵

NOTE.—If the consideration for a bill given by an infant be necessities supplied to him, he may be liable on the consideration, though not on the bill. The age at which infancy ceases differs much in different countries: *e.g.*, in India it is 18; in Germany, 23. In most continental countries a distinction is drawn between infant traders and non-traders; the former having full capacity.

Art. 64. When a bill is payable to the order of an infant, his indorsement (probably) transfers the Minor's
property therein.⁶ power to transfer.

NOTE.—Cf. Art. 68. An infant's executed contracts are usually valid. As an infant may be an agent his indorsement in that character gives rise to no difficulty. In America it is not uncommon

¹ *Lewis v. Bright* (1855), 24 L. J. Q. B. 191.

² Cf. Infants' Relief Act, 1874, 37 & 38 Vict. c. 62.

³ *Ex parte Kibble* (1875), 10 L. R. Ch. 373.

⁴ *Belfast Banking Co. v. Doherty* (1879), 4 Ir. C. L. R. Q. B. D. 124.

⁵ *Ex parte Lynch* (1876), 2 L. R. Ch. D. 227.

⁶ Cf. *Lebel v. Tacker* (1867), 8 B. & S. at 833; *Nightingale v. Withington* (1818), 15 Mass. 272; *Grey v. Cooper* (1782), 3 Dougl. 65; Indian Draft Code, Art. 13.

Minor's
power to
transfer.

to get a bill made payable to the order of an infant clerk ; his indorsement then operates as an indorsement *sans recours*, though without discrediting the bill.

Married
woman's
liability.

Art. 65. Except as hereinafter mentioned a married woman incurs no liability by drawing, indorsing, or accepting a bill.¹

ILLUSTRATION.

A married woman, having no separate estate, makes a note, signing it "J. B., widow." She is not liable thereon.²

Exceptions.—1. Married woman having separate estate.³ 2. Married woman being a sole trader in the City of London, if sued in the City Court.⁴ 3. Married woman whose husband is *civilitur mortuus*, or an alien resident and domiciled abroad.⁵

NOTE.—A married woman may have separate estate either under a settlement or under the Married Woman's Property Act, 1870.⁶ As to the proper form of order charging a married woman's separate estate to enforce payment of a bill, see *Davis v. Jenkins*.⁷ A married woman cannot be proceeded against on a bill under Order XIV.⁸

Transfer
by married
woman.

Art. 66. When a bill is payable to the order of a married woman, she cannot by her indorsement transfer the property therein.⁹

Exception 1.—Bill indorsed by married woman under such circumstances as would render her liable on her indorsement. (Art. 65.)

¹ *Cannan v. Farmer* (1849), 3 Exch. 698 ; Cf. *Coward v. Hughes* (1855), 1 K. & J. 443.

² *Id.*

³ *McHenry v. Davis* (1870), 10 L. R. Eq. 88 ; Cf. *London Chartered Bank v. Lamprière* (1873), 4 L. R. P. C. at 593—594.

⁴ Cf. *Beard v. Webb* (1800), 2 B. & P. 93.

⁵ Cf. Chitty on Contracts, 10 ed. 174.

⁶ Cf. *Summers v. City Bank* (1874), 9 L. R. C. P. 580 ; *Davies v. Jenkins* (1877), 6 Ch. D. 728.

⁷ 6 Ch. D. at 730, and Seton, 4 ed. p. 687.

⁸ *Ortner v. Fitz Gibbon* (1880), 50 L. J. Ch. 17.

⁹ Cf. *Smith v. Marsack* (1848), 18 L. J. C. P. 65 ; and Art. 98.

Exception 2.—Bill indorsed by married woman as agent for her husband.¹

Transfer
by married
woman.

ILLUSTRATION.

A bill is payable to the "order of Mrs. C." With the consent of her husband she indorses it, signing her own name. The property in the bill passes by this indorsement.²

NOTE.—*Qu.* if in the case given, the husband would not be liable as indorser? See *Lindus v. Bradwell* (1848), 5 C. B. 583.

Art. 67. A corporation incurs no liability by drawing, indorsing, or accepting a bill, unless expressly or impliedly empowered by its Act of incorporation so to do.³

Liability of
company
or corpora-
tion.

ILLUSTRATION.

1. A joint stock company is incorporated for the purpose of forming a *société anonyme* abroad for the construction of Railways. The directors are empowered by the memorandum and articles of association to do whatever they may from time to time think incidental or conducive to the main object of the company. These terms cover the issue of bills, and such a company is liable on its acceptance.⁴

2. A railway company, incorporated under an ordinary Railway Act, accepts bills which are negotiated. The company is not liable on its acceptances.⁵

NOTE.—In the case of a trading corporation the fact of incorporation for the purposes of trade would give capacity. In the case of non-trading corporations, the power must be expressly given, or there must be terms in the charter wide enough to include it. The Companies Act, 1862, § 47, does not confer capacity on all companies under that Act. It merely prescribes the mode in which such companies as have the requisite capacity are to exercise it.⁶ A mining company, a cemetery company, a salvage company, a gas company, an alkali works company, and a waterworks company

¹ *Prince v. Brunatle* (1835), 1 Bing. N. C. 435.

² *Cotes v. Davis* (1808), 1 Camp. 485.

³ *Re Peruvian Railways Company* (1867), 2 L. R. Ch. 617.

⁴ *Baleman v. Mid Wales Railway Company* (1866), 1 L. R. C. P. 490.

⁵ Cf. *Re Peruvian Railways Company*, *supra*.

Liability of company or corporation. have been held non-trading companies.¹ Cf. Art. 78, as to non-trading partnerships. There is this distinction: A non-trading partnership can adopt a bill, but the bill of a company lacking capacity is, as regards the company, incurably bad; for a contract *ultra vires* of a corporation cannot be ratified. Query, if the rule as to drawing bills or making notes applies to cheques. Is a non-trading corporation liable on the instrument to the bearer of a dishonoured cheque which it has drawn, or is it only liable on the consideration to its immediate obligee? In America, the capacity of a corporation to bind itself by bill or note is coextensive with its capacity to contract.² The capacity of a company ceases when a resolution to wind it up has been passed, although the resolution may not have been notified in the *Gazette*.³ See also Arts. 50, 51.

Power of corporation to transfer.

Art. 68. When a bill is payable to the order of a corporation, the indorsement of the corporation passes the property therein, though from want of capacity the corporation may not be liable as indorser.⁴

NOTE.—So, too, bankers may be justified in paying cheques out of the funds of a company, where clearly, by the form of the cheques, the company would not be liable as drawers if they had not been paid.⁵

Statutory Disabilities of Bankers.

Banker and banking company.

Art. 69. It is unlawful for a banker or banking company, other than the Bank of England—

(a) To issue in the United Kingdom any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand.⁶

¹ *Baleman v. Mid Wales Railway* (1866), 1 L. R. C. P. 499 at 505.

² *Parsons*, pp. 164, 165.

³ *Re Bolognesi* (1870), 5 L. R. Ch. 567.

⁴ *Smith v. Johnson* (1858), 3 H. & N. 222; Cf. Arts. 61, 80, 81.

⁵ *Mahoney v. East Holyford Company* (1875), 7 L. R. H. L. 869 and 884.

⁶ 7 & 8 Vict. c. 32, §§ 10 and 28 (Bank Charter Act, 1844), as explained by 17 & 18 Vict. c. 83, §§ 11 and 12.

- (b) To draw, accept, make, or issue in England or Wales, any bill of exchange or promissory note which is expressed to be, or in legal effect is, payable to bearer on demand, or to borrow, owe, or take up any sum or sums of money on such bill or note.¹

Exception.—Banker or banking company lawfully issuing such bills or notes on May 6, 1844, but subject to certain conditions.²

NOTE.—Previous statutes define the bankers who in 1844 were lawfully issuing such bills and notes. The result seems to be that in London and within a circle of three miles round, the Bank of England has a monopoly; that beyond three and within 65 miles, the monopoly is shared with banks of less than ten persons established before 1844; that beyond the 65-mile limit, the monopoly is shared with all banks established before 1844 who have not since lost their privileges.³ The statutes now in force affecting bills by conferring exclusive banking privileges on the Bank of England are: 39 & 40 Geo. 3, c. 28, § 15; 7 Geo. 4, c. 46; 9 Geo. 4, c. 23; 3 & 4 Will. 4, c. 83, § 2; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32; 8 & 9 Vict. c. 76, § 5; 17 & 18 Vict. c. 83, §§ 11 and 12; 25 & 26 Vict. c. 89, Sched. III. Their provisions are inconsistent, but the later Acts do not expressly repeal the earlier ones, so the whole must be construed together. See also Arts. 11 and 16.

Authority.

Art. 70. Subject to any exceptions mentioned in this chapter, bills are governed by the ordinary rules of law relating to principal and agent, and partnership.

Art. 71. The general rule of law as to the liability of an undisclosed principal does not apply to bills; Signature essential to liability.

¹ 7 & 8 Vict. c. 32, §§ 11 and 28, as explained by 17 & 18 Vict. c. 83, § 11.

² *Id.*

³ *Lindley*, p. 191 n., and 1615—1617.

Signature essential to liability. and no person is liable as drawer, indorser or acceptor of a bill who has not signed it as such.¹

ILLUSTRATIONS.

1. A., who is agent for X., draws a bill in his own name in favour of C. C. knows that A. is only an agent. A. alone is liable as drawer of this bill. X. is not.²

2. B. and X. are jointly indebted to C. B. alone makes a note in favour of C. for the amount of the debt. B. alone is liable as maker.³

3. A. draws a bill, signing it "J. A., agent." A. alone is liable as drawer. His principal is not.⁴

4. D. is the holder of a bill indorsed in blank by C. D. converts C.'s indorsement in blank into a special indorsement to E., and transfers the bill to the latter. D. is not liable as indorser.⁵

NOTE.—Bills form an exception to the ordinary rule that when a contract is made by an agent in his own name, evidence is admissible to charge the undisclosed principal, though not to discharge the agent. A person who has not signed, though not liable on the instrument, may of course be liable on the consideration: *e.g.*, X. would be so liable in Illust. 2. The distinction is this: In the one case the liability is transferable; in the other it is not; also the *onus probandi* is shifted.

Explanation 1.—The term person includes firm, company, and corporation.

ILLUSTRATIONS.

1. X., a partner in a firm who trade as "John Brown," makes a note for 100*l.* in respect of a partnership transaction, signing it as "Brown & Co." He has no authority from his partners to vary the firm style. The firm is not liable on this note, though X. individually is bound by it.⁶

¹ Cf. *Fenn v. Harrison* (1790), 3 T. R. at 761; *Re Adams & Co.* (1874), 43 L. J. Ch. at 734, James, L. J.

² Cf. *Leadbitter v. Farrow* (1816), 5 M. & S. at 350; *Ex parte Rayner* (1868), 17 W. R. 64.

³ *Stiffin v. Walker* (1809), 2 Camp. 308.

⁴ *Pentz v. Stanton* (1833), 10 Wend. 271, New York.

⁵ *Vincent v. Horlock* (1808), 1 Camp. 442.

⁶ *Faith v. Richmond* (1840), 11 A. & E. 339; *Kirk v. Blurton* (1841), 9 M. & W. 284.

2. A. is a partner in the firm of "B. & Co." A., in respect of Signature
a partnership transaction, draws a bill in his individual name on essential to
"B. & Co." It is refused acceptance. A. alone is liable as drawer; liability.
his copartners are not.¹

NOTE.—If, in Illust. 1, B.'s partners had authorised the change of style, the altered style would have been *pro hac vice* the firm style, and binding on them. The firm, too, is bound if the variation in style be immaterial and unintentional.² And if there be not a distinct firm style, it seems a partner may sign the individual names of his copartners:³ Cf. Art. 50, Signature of Corporation.

Explanation 2.—A person is bound by his signature who signs a bill in a trade or fictitious name as if he had signed it in his own name.⁴

ILLUSTRATIONS.

1. John Smith carries on business under the name of "John Brown," or "Brown & Co.," or "The London Iron Company." John Smith is liable on a bill drawn, indorsed, or accepted by him in any of these names.⁵

2. A principal trades and carries on a business in the name of one of his agents (a clerk). He is liable on a bill accepted by the clerk in his own name in respect of that business, although the clerk in accepting it acted contrary to his private instructions.⁶

NOTE.—Cf. *Lindley*, 3 ed. p. 357. So, too, [a firm may trade under its own name in one place, and under the name of one of the partners in another place. His name then becomes the firm name.⁷

Explanation 3.—The signature of a firm is deemed

¹ *Nicholson v. Ricketts* (1860), 29 L. J. Q. B. at 65; *Re Adanson Co.* (1874), 43 L. J. Ch. 732, firm composed of four firms.

² *Forbes v. Marshall* (1855), 11 Exch. 166. As to an accidental misspelling, see *Leonard v. Wilson* (1834), 2 Cr. & M. 589; *Kirk v. Blurton* (1841), 9 M. & W. at 289.

³ *Norton v. Seymour* (1847), 16 L. J. C. P. 100.

⁴ Cf. *Lindus v. Bradwell* (1848), 5 C. B. at 591; Cf. Art. 37, Expl. 2; and *Trueman v. Loder* (1840), 11 A. & E. at 594.

⁵ Cf. *Wilde v. Keep* (1834), 6 C. & P. 235; *Forman v. Jacob* (1815), 1 Stark. 47.

⁶ *Edmunds v. Bushell* (1865), 1 L. R. Q. B. 97; Cf. *Conro v. Port Henry Iron Co.* (1851), 12 Barb. 27, New York.

⁷ Cf. *Alliance Bank v. Kearsley* (1871), 6 L. R. C. P. at 438, Willes, J.

Signature essential liability. to be the signature of all persons who are partners in the firm, whether working, dormant, or secret ;¹ or who, by holding themselves out as partners, are liable as such to third parties.²

ILLUSTRATION.

X. is a working partner in the firm of "B. & Co." He retires from the firm, but gives no notice of his retirement. He is liable on a bill accepted by the firm subsequent to his retirement.³

Explanation 4.—Where the name of a firm, and the name of one of the partners in it is the same, and that partner draws, indorses, or accepts a bill in the common name, the signature is *prima facie* deemed to be the signature of the firm ; but the presumption may be rebutted by showing that the bill was not given for partnership purposes or under the authority of the firm.⁴

NOTE.—It was formerly thought that where two distinct firms, having one or more partners in common, carried on business under the same name, each firm was liable on the acceptances of the other to a holder for value without notice, see *Lindley*, 3rd ed., 387. But since the case of *Yorkshire Banking Co. v. Bealson*,⁵ it seems clear that this hard rule is no longer law.

Hand that signs immaterial.

Art. 72. It is immaterial by whose hand a signature is made, provided there be authority to sign.⁶

ILLUSTRATION.

Bill payable to C.'s order, and indorsed in his name. It is proved that C.'s wife had authority to indorse bills for him, and that in this case C.'s name was written by his daughter, in the presence and by the direction of his wife. This is sufficient.⁷

¹ *Pooley v. Driver* (1876), 5 Ch. D. 458 ; *Lindley on Partnership*, 3rd ed., pp. 355—357.

² *Gurney v. Erans* (1858), 27 L. J. Ex. 166 ; *Lindley on Partnership*, 3rd ed., pp. 355—357.

³ *Lindley*, pp. 418—426.

⁴ *Yorkshire Banking Co. v. Bealson* (1880), 5 C. P. D. 109, C. A.

⁵ *Supra*, see at p. 114.

⁶ *Lord v. Hall* (1849), 8 C. B. 627.

⁷ *Id.*

CAPACITY AND AUTHORITY.

NOTE.—By 19 & 20 Vict. c. 97, § 6, an acceptance must be Hand
“signed by the acceptor or some person duly authorised by him.” signs in
In the case of a corporation, it is clear that the signature must be materia
by the hand of an agent. Where an agent merely signs his principal’s name, the question is, had he ostensible authority so to do ;
but when the form of signature shows that the principal has not
signed himself, *caveat emptor* : see Arts. 74, 75.

Art. 73. An authority to sign bills on behalf of another may be either express (verbal or written), or implied from circumstances.¹

ILLUSTRATIONS.

1. X., in B.’s presence, and with his assent, indorses a bill in B.’s name. This is to all intents and purposes an indorsement by B.²

2. It is shown that X. is in the habit of accepting bills in B.’s name ; that B. is aware of it, and duly honours such bills. This is evidence from which an authority to X. to accept bills may be implied.³

3. C. the holder of a bill payable to order transfers it for value to D. without indorsing it. This is not an authority to D. to indorse it in C.’s name.⁴

Explanation.—Where an express authority to the agent must be proved or is relied on, such authority is to be strictly construed.⁵

ILLUSTRATIONS.

1. An authority to draw bills does not include an authority to indorse them.⁶

2. An authority to an agent to receive payment from B. by drawing on him does not authorise the agent to draw a bill payable to his own order.⁷

¹ *Prescott v. Flynn* (1832), 9 Bing. 19 ; Cf. Art. 81, Excep. 1.

² Cf. *Lord v. Hall* (1849), 8 C. B. 627.

³ Cf. *Morris v. Belhell* (1869), 5 L. R. C. P. at 51.

⁴ *Harrop v. Fisher* (1861), 30 L. J. C. P. 233.

⁵ *Attwood v. Munnings* (1827), 7 B. & C. 278 ; and Cf. *Fearn v. Filica* (1844), 7 M. & Gr. 513.

⁶ Cf. *Prescott v. Flynn* (1832), 9 Bing. at 22.

⁷ *Hogarth v. Wherley* (1875), 10 L. R. C. P. 530.

Express
authority
not neces-
sary.

Signature
per proc.
principal.

3. An authority to draw cheques does not authorise drawing post-dated cheques, which are Bills of Exchange.¹

Art. 74. A signature "per procuration," or in other such terms as denote that the signature of the principal is placed on the bill by the hand of an agent, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature to the extent of the actual authority possessed by the agent.²

ILLUSTRATIONS.

1. B., who carries on business for himself, and is also in partnership with X., goes abroad; he gives X. an authority to accept bills in his name in respect of his private business. X. accepts a bill in B.'s name in respect to the partnership business, signing "p.p. X. B." The bill is negotiated. B. is not liable on this acceptance.³

2. By a resolution of the directors, the chairman of a company is authorised to accept bills drawn by A. against the deposit of securities. He accepts a bill drawn by A., signing per proc. the company, without requiring the deposit of security. The bill is negotiated to a *bond fide* holder. The company is liable.⁴

NOTE.—There is perhaps a disposition to narrow the rule in the case of corporations.⁵ In an Irish case⁶ a distinction is drawn between an acceptance signed "J. B., per proc. T. S.," and one signed "For J. B. T. S." The distinction does not seem founded on any very clear principle. The case can be supported on other grounds.

Signature
per proc.
agent.

Art. 75. A person who, without authority, signs the name of another person to a bill, either simply

¹ *Forster v. Mackreth* (1867), 2 L. R. Ex. 163.

² Cf. *Charles v. Blackwell* (1877), 2 L. R. C. P. D. at 159, 160, C. A.

³ *Atwood v. Munnings* (1827), 7 B. & C. 278; *Stagg v. Elliott* (1862), 12 C. B. N. S. 373.

⁴ *Re Land Credit Co.* (1869), 4 L. R. Ch. 460; and Cf. *Ex parte Meredith* (1863), 32 L. J. Ch. 300.

⁵ *Re Land Credit Co.*, *supra*, at 468.

⁶ *O'Reilly v. Richardson* (1865), 17 Ir. Com. L. R. 74; but Cf. *Balfour v. Ernest* (1859), 28 L. J. C. P. at 176.

or by a procuration signature, is (probably) not liable on the instrument.¹ Signature
per proc.
agent.

Exception.—If the alleged principal be a fictitious or non-existing person, the signer is liable.²

ILLUSTRATION.

A bill drawn on B. is held by C. X., without authority, accepts it for B., signing "B. per proc. X." X. is not liable as acceptor, though he may be liable to C. or a subsequent holder in an action for a false representation.³

NOTE.—In an action for false representation, under such circumstances, it lies on the holder to prove damage.⁴ The modern tendency is to restrict liability *ex delicto* to cases of intentional fraud. By German Exchange Law, Art. 95, a person who, without authority, signs a bill as agent for another is personally liable thereon. The Indian Draft Code adopts this rule. To sign the name of another person to a bill "per proc." without authority and with intent to defraud was not a forgery at common law, but it is now made so by statute.⁵

Art. 76. A person who signs a bill in a representative or official character, or who, in signing, describes himself as agent for a principal, whether named or not, is personally liable thereon, unless in express terms he repudiate such liability.⁶ Signature
as agent
representative.

ILLUSTRATIONS.

1. Money is lent to a parish. The churchwardens give a note for the amount, signing it "J. B., } Churchwardens." They are personally liable on the note as makers.⁷

2. B. by will directs his executor to carry on his business. He does so, and in the course of the business accepts bills, signing

¹ *Polhill v. Waller* (1832), 3 B. & Ad. 114.

² Cf. *Kelner v. Baxter* (1866), 2 L. R. C. P. 174; and Art. 72, Expl. 2.

³ *Polhill v. Waller* (1832), 3 B. & Ad. 114.

⁴ *Eastwood v. Bain* (1858), 3 H. & N. 738.

⁵ 24 & 25 Vict. c. 98, § 24.

⁶ *Leadbitter v. Farrow* (1816), 5 M. & S. 348.

⁷ *Rew v. Pettit* (1834), 1 A. & E. 196.

Signature as agent or representative. "J. S. executor of B." He is personally liable on these acceptances.¹

3. D., the holder of a bill payable to his order, dies. X., his executor, indorses the bill away, signing the indorsement, "J. X., executor of D." X. is personally liable on this indorsement, unless he add some such words as "without recourse against me personally."²

4. Money is lent to the X. Company. A note for the amount is given in the form, "We promise to pay, *et cet.*" signed,

"J. B., }
 "J. S., } Directors of the X. Company, Limited.
 "J. T., Manager."

The persons who sign are personally liable as makers.³

5. Money is lent to the X. Railway Co. A note for the amount is given in the form, "I promise to pay, *et cet.*" (signed), "For the X. Railway Co. J. B., Secretary." J. B. is not personally liable.⁴

6. Note in the form, "We, the directors of the X. Company, Limited, *et cet.*" (signed by the directors), "J. B. J. S." In the corner of the note is the seal of the company, and the signature of an attesting witness. J. B. and J. S. are personally liable.⁵

7. Bill specially indorsed to "C., agent." He indorses it away, signing "C., agent." C. is personally liable as indorser.⁶

NOTE.—for further illustrations, Cf. Art. 50 and Art. 37, Ex. 3. The terms agent, manager, &c., attached to a signature are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal: Cf. Art. 71. It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal. The maxim *ut res magis valeat* governs the construction.

Trading firm.

Art. 77. A partner in a trading firm has *primâ facie* authority to bind the firm by drawing, indors-

¹ *Liverpool Bank v. Walker* (1859), 4 De G. & J. 24.

² Cf. *Childs v. Monins* (1821), 2 Brod. & B. 460.

³ *Courtauld v. Saunders* (1867), 16 L. T. N. S. 562.

⁴ *Alexander v. Sizer* (1869), 4 L. R. Ex. 102; but see *Gray v. Eaper* (1866), 1 L. R. C. P. 694.

⁵ *Dutton v. Marsh* (1871), 6 L. R. Q. R. 361.

⁶ *Bentley v. Hunt*, 1876, 120 Mass. 92.

ing, or accepting bills in the firm name for partner-ship purposes; and if the bill get into the hands of a holder for value without notice, the presumption of authority becomes absolute, and it is immaterial whether it were given for partnership purposes or not.¹

ILLUSTRATIONS.

1. X., a partner in a trading firm, makes a note in the firm's name, payable to C., and gives it to him in payment of a private debt. It lies on C. to show that X. had authority from his co-partners so to do.²

2. A. draws two bills on a firm in respect of one and the same debt. By mistake both bills are accepted. The bills are negotiated to *bonâ fide* holders. The firm is liable on both.³

3. A partner accepts in the firm name a bill drawn on the firm in respect of a debt partly due from the firm and partly due from himself alone. Fraud is negatived, but the holder knows the facts. The *pro tanto* liability of the firm on the instrument is doubtful.⁴

NOTE.—In Illust. 3, the safe plan is to sue on the consideration. This Art. and the next are merely deductions from the general rule that a partner has implied authority to do any act necessarily incidental to the proper conduct of the partnership business, and that there the presumption of authority ends.

There is a quasi exception to the general rule where the name of the firm is the same as the name of one of the partners in it. In that case an acceptance in the common name, written by the partner whose name it is, may be shown to be his individual acceptance and not binding on the firm.⁵

Art. 78. A partner in a non-trading partnership has *primâ facie* no authority to render his copartners liable by signing bills in the partnership name. The holder must show authority, actual or ostensible.⁶

¹ *Wiseman v. Easton* (1863), 8 L. T. N. S. 637; *Lindley*, 3rd ed., p. 280.

² Cf. *Levison v. Lane* (1862), 32 L. J. C. P. 10.

³ *Davison v. Roberts* (1815), 3 Dow. 218; H. L.

⁴ *Ellston v. Deacon* (1866), 2 L. R. C. P. at 21.

⁵ *Yorkshire Banking Co. v. Beatson* (1880), 5 C. P. D. 109, C. A.

⁶ *Lindley*, 3rd ed., p. 280; *Dickinson v. Vulpy* (1829), 10 B. & C. at 137; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425.

Non-
trading
firm.

Explanation.—Partnerships, such as professional partnerships (*e.g.*, solicitors),¹ mining partnerships,² agricultural partnerships,³ and commission agencies⁴ have been held non-trading,

NOTE.—In America, physicians, tavern-keepers, tunnel-workers, and farmers, have been held non-traders.⁵ In *Harris v. Amery* (1865), 1 L. R. C. P. at 154, Willes, J., points out that the term “trade” is not coextensive with the term “business.” It does not seem to be decided how far the rule applies to cheques, as well as to bills and notes. The question cannot often arise, because opening an account in the firm name is evidence of actual authority. Note, that authority to draw cheques is not evidence of authority to draw bills, and a post-dated cheque is a bill.⁶

Power to
transfer.

Art. 79. Where a bill is payable to the order of a firm, a partner who cannot by his indorsement render his copartners liable, may transfer the property therein by negotiating it in the firm name.⁷

ILLUSTRATIONS.

1. Bill specially indorsed to a non-trading partnership. One of the partners without communicating with his co-partners, indorses it away for a firm debt. The property in the bill passes to the indorsee.⁸

2. Bill specially indorsed to a firm under a wrong style (*e. g.*, to “Smith, Brown, & Co.,” whereas the proper style is “Brown & Co.”). One of the partners indorses it away, using, without the assent of the rest, the wrong style. The firm is not liable on the indorsement, but the property in the bill passes to the indorsee.⁹

NOTE.—Cf. Art. 71 as to the principle. When a bill payable to the order of a firm is indorsed by a partner in the firm name, in fraud of his copartners, the property therein does not pass to an

¹ *Garland v. Jacomb* (1873), 8 L. R. Ex. at 219.

² *Ricketts v. Bennett* (1847), 4 C. B. at 699.

³ *Kimbro v. Bullit* (1859), 20 Howard, 256.

⁴ *Yates v. Dalton* (1859), 28 L. J. Ex. 69.

⁵ *Parsons on Partnerships*, 2nd ed., p. 99 *n.*; Cf. Art. 67, as to Companies.

⁶ *Forster v. Mackreth* (1867), 2 L. R. Ex. 163.

⁷ *Lindley*, 3rd ed., p. 282; and Cf. Arts. 61, 64, 68.

⁸ Cf. *Smith v. Johnson* (1858), 3 H. & N. 222.

⁹ *Williamson v. Johnson* (1823), 1 B. & C. 146; *Kirk v. Blurton* (1841), 9 M. & W. at 287.

indorsee with notice, but there seem to be technical difficulties in the way of an action brought by the firm.¹ In such case the proper course, perhaps, is to give notice to the acceptor not to pay. He could defend an action against a holder with notice. Power to transfer.

Art. 80. When a bill is payable to the order of a firm, and the partnership is subsequently dissolved, the indorsement of an ex-partner in the late firm name transfers the property therein and authorizes the payment thereof.² Ex-partners.

NOTE.—*Lewis v. Reilly*² may be open to question in so far as it lays down that an ex-partner, by indorsing a bill in the late firm name, renders his former partners liable as indorsers to a holder with notice of the dissolution.³

Forgery, Etc.

Art. 81. Except as hereinafter mentioned, no person is liable as a party to a bill whose signature has been placed thereon without his authority, and no right or title can be derived through a forged or unauthorized signature.⁴ (Cf. Art. 139). Forged or unauthorized signatures.

ILLUSTRATIONS.

1. A bill is payable to the order of John Smith. Another person of the name of John Smith gets hold of it and indorses it to D., who takes it in good faith and for value. D. acquires no title to the bill, he cannot enforce payment against any of the parties thereto, and should any party pay him, the payment is invalid.⁵

2. A note payable to order is stolen from the payee. The thief forges the payee's indorsement, and collects the note from the

¹ *Heilbutt v. Nevill* (1870), 5 L. R. C. P. 478, Ex. Ch.

² *King v. Smith* (1829), 4 C. & P. 188; *Lewis v. Reilly* (1841), 1 Q. B. 349.

³ Cf. *Lindley*, 3rd ed., p. 423; *Kilgour v. Finlayson* (1789), 1 H. Bl. 155; *Abel v. Sutton* (1800), 3 Esp. 108; *Anderson v. Weston* (1840), 6 Bing. N. C. 296.

⁴ *Bank of Bengal v. Fagan* (1849), 7 Moore, P. C. at 72; *Harrop v. Fisher* (1861), 30 L. J. C. P. 283; *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. 107; *Massé*, § 1529.

⁵ *Mead v. Young* (1790), 4 T. R. 28; *Graves v. American Bank* (1858), 17 New York R. 205 (payment).

Forged or unauthorized signatures. maker's banker, who returns the note to the maker. The payee can recover the amount of the note from the maker in an action for conversion of the note.¹

3. A bill is payable to C.'s order. His indorsement is forged. D., a subsequent holder, presents the bill for acceptance. The drawee accepts it payable at his bankers'. The bankers pay D. They cannot debit the acceptor with this payment.²

4. A bill is payable to the order of a firm. X., one of the partners, fraudulently indorses it in the firm name to D. in payment of a private debt. The acceptor pays D. X. becomes bankrupt. X.'s copartners and trustee can recover from D. the money he received on the bill.³

5. C. specially indorses a bill to D. It is stolen before delivery to D., and D.'s indorsement in blank is forged on it. It comes into X.'s hands, and he gets his bankers to present it for payment. They receive payment, and credit X. with the amount. X. subsequently draws out the whole sum. C. can recover the amount of the bill from the bankers.⁴

Explanation. — An unauthorized signature, not amounting to a forgery, may be ratified, but a forged signature (probably) cannot be ratified.⁵

ILLUSTRATIONS.

1. Note for 100*l.* X. forges B.'s signature to as maker. Before the note matures the holder finds out that B.'s signature is a forgery, and threatens to prosecute X. In order to prevent this, B. gives the holder a memorandum, which says, "I hold myself responsible for the note for 100*l.* bearing my signature." The ratification is invalid. B. is not liable on the note.⁶

2. A. draws a bill payable to C.'s order. As between A. and C. the consideration is fraudulent. X. forges C.'s indorsement, and negotiates the bill to D., who takes it in good faith. D. finds out

¹ *Johnson v. Windle* (1836), 3 Bing. N. C. 225.

² *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

³ *Heilbutt v. Nevill* (1870), 5 L. R. C. P. 478, Ex. Ch.

⁴ *Arnold v. Cheque Bank* (1876), 1 C. P. D. 578; Cf. *Charles v. Blackwell* (1877), 2 C. P. D. at 157.

⁵ *Brook v. Hook* (1871), 6 L. R. Ex. 89; and Cf. *Williams v. Bayley* (1866), 1 L. R. H. L. 200, at 221.

⁶ *Id.*; and *Ex parte Edwards* (1841), 2 Mon. D. & D. 241.

that C.'s indorsement has been forged, and after the bill is due he obtains a genuine indorsement from C., giving him half the value of the bill. D. cannot sue A.¹

Forged or
unautho-
rized sig-
natures.

NOTE.—In America it is laid down that a forgery may be ratified,² but perhaps the cases might be explained on the ground of estoppel. In a recent Scotch appeal in the House of Lords, Lord Blackburn lays down that a forgery may be ratified,³ but the English cases were not cited, and the decision turned on another ground, namely, that the facts had not created an estoppel.

Exception 1.—A person whose signature is forged or placed on a bill without his authority may be estopped from setting up the fact. (Cf. Arts. 52 and 73.)

ILLUSTRATIONS.

1. B.'s acceptance to a bill is forged. A holder who takes it *bonâ fide* is afterwards informed that the signature is not B.'s, and accordingly writes to inquire. B. writes back to say the signature is his. B. is liable on this acceptance.⁴

2. X., a partner in a trading firm, fraudulently accepts a bill in the firm name for a private debt of his own. It is negotiated to a holder for value without notice. The firm is estopped from setting up X.'s fraud.⁵

3. The acceptor of a bill forges A.'s name thereon as drawer, then discounts it with a bank. The bill is dishonoured, and notice sent to A. The acceptor gets the bill renewed for a smaller sum, paying the difference in cash to the bank, and on the renewal again forges A.'s name as drawer. The renewed bill is dishonoured, and notice sent to A. A. does not repudiate the transaction for 14 days. He is not estopped from setting up that his signature was forged.⁶

4. X. forges B.'s acceptance. B. pays the holder. Afterwards X. again forges B.'s acceptance which, unknown to B., gets into

¹ *Esdaile v. Lanauze* (1835), 1 Y. & C. 394.

² *Union Bank v. Middlebrook* (1865), 33 Connect. 95; *Howard v. Duncan* (1870), 3 Lans. New York, 174.

³ *McKenzie v. British Linen Co.* (1881), 6 App. Cas. at 99, H. L.

⁴ *Brook v. Hook* (1871), 6 L. R. Ex. at 100; *Wilkinson v. Stoncy* (1839), 1 J. & S. 509; *Robarts v. Tucker* (1851), 16 Q. B. at 577.

⁵ *Hogg v. Skeen* (1865), 18 C. B. N. S. at 432, Willes, J.

⁶ *McKenzie v. British Linen Co.* (1881), 6 App. Cas. 82 H. L.

Forged or unauthorized signatures. the hands of the same holder. B. may set up that his signature was forged.¹

Exception 2.—If a bill is payable to the order of a married woman, as forming part of her separate estate, and her husband forges her indorsement, the property in the bill (probably) passes thereby to a holder who takes it for value and without notice.²

Exception 3.—A banker who, as drawee, pays a cheque held under a forged or unauthorized indorsement is protected by statute. (Art. 263; see, too, Art. 274).

Exception 4.—A party to a bill may be estopped by his conduct;³ or, in certain cases, by the fact of becoming a party,⁴ from setting up that the signatures of other parties thereto are forged or unauthorized.

NOTE.—Where an estoppel by negligence is relied on, it must appear that the negligence was the direct and proximate cause of the forgery being taken as genuine.⁵ Where a bill is held under a forged signature, the Court will restrain its negotiation by injunction, or order it to be given up and cancelled.⁶

¹ *Morris v. Bethell* (1869), 5 L. R. C. P. 47.

² *Dawson v. Prince* (1858), 27 L. J. Ch. 169, L. JJ.

³ *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. 578; *Patent Safety Gun Cotton Co. v. Wilson* (1880), 49 L. J. C. P. 713, C. A.

⁴ Cf. Estoppels, Drawer, Art. 216; Maker of Note, Art. 287; Indorser, Art. 219; Acceptor, Art. 212; Acceptor *supra* Protest, Art. 228; Fictitious Payee, Art. 139; Fictitious Drawee, Art. 2.

⁵ *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. 578.

⁶ *Estaille v. Lanauze* (1835), 1 Y. & C. 394; and *Seton on Decrees*, 4 ed., pp. 281—283.

CHAPTER III.

CONSIDERATION.

Art. 82. "Value" means "valuable consideration," and is constituted by Value defined.

(a.) Any consideration sufficient to support a simple contract.

ILLUSTRATIONS.

1. A cross acceptance,¹ the forbearance of the debt of a third person,² the compromise of a disputed liability,³ a promise to give up a bill thought to be invalid,⁴ or a debt barred by the Statute of Limitations,⁵ constitute value.

2. A mere moral obligation,⁶ a debt represented to be due though not really due,⁷ the giving up a void note,⁸ or a voluntary gift of money,⁹ do not constitute value.

(b.) An antecedent or pre-existing debt.¹⁰

Explanation.—When the consideration for the issue or subsequent negotiation of a bill is an antecedent debt, it is immaterial whether the instrument is payable on demand or at a future time.¹¹

¹ *Rose v. Sims* (1830) 1 B. & Ad. at 526; Cf. *Burdon v. Benton* (1847), 9 Q. B. 843; *Hornblower v. Proud* (1819), 2 B. & Ald. 327. As to proof on cross-acceptances see *Ex p. Cama* (1874), 9 L. R. Ch. 687; *Baldwin's Bankruptcy*, p. 157.

² *Balfour v. Sea Assur. Co.* (1857), 3 C. B. N. S. 300.

³ *Cook v. Wright* (1861), 30 L. J. Q. B. 321.

⁴ *Smith v. Smith* (1863), 13 C. B. N. S. 418.

⁵ *Latouche v. Latouche* (1865), 3 H. & C. at 576.

⁶ *Eastwood v. Kenyon* (1840), 11 A. & E. 438; Cf. *Flight v. Reed* (1863), 32 L. J. Ex. 265.

⁷ *Southall v. Rigg* (1851), 11 C. B. 481.

⁸ *Coward v. Hughes* (1855), 1 K. & J. 443; but Cf. *Mather v. Maidstone* (1855), 18 C. B. 273, where an estoppel intervened.

⁹ *Hill v. Wilson* (1873), 8 L. R. Ch. at 894.

¹⁰ *Poirier v. Morris* (1853), 2 E. & B. 89; *Swift v. Tyson* (1842), 15 Pet. 1 Sup. Ct. U. S. Story, J.; Cf. *Butcher v. Stead* (1875), 7 L. R. H. L. 839.

¹¹ *Currie v. Misa* (1875), 10 L. R. Ex. 153, Ex. Ch.; approved but affirmed on another ground, 1 App. Cas. 554.

Value
defined.

NOTE.—*Adequacy of value.*—Valuable consideration has been defined as “some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.”¹ The Courts do not inquire into the adequacy of a *bona fide* consideration.² This was always the law as regards considerations other than money, but when the consideration was money, the usury laws formerly created a difficulty. This has now been removed.³ But inadequacy of consideration may be evidence of bad faith or fraud.⁴ Again, inadequacy of consideration must be distinguished from partial absence of consideration (Art. 91), partial failure of consideration (Art. 93), part payment on account,⁵ or a mere advance made on a bill which is pledged or deposited as security (Art. 84).

Unconscionable Bargains.—Although the adequacy of the value given will not be inquired into where parties contract on an equality, the Court in the exercise of its equitable powers will grant relief, as between immediate parties, either with or without terms, when an unfair advantage has been taken of a person's position, though there may be nothing amounting to positive fraud; e.g., in case of a catching bargain with an expectant heir or reversioner,⁶ or where a woman has been induced to give an accommodation acceptance without independent advice.⁷

Holder for
value.

Art. 83. If value has at any time been given for a bill, the holder of it is a holder for value as regards the acceptor and all parties prior to such time.⁸

ILLUSTRATIONS.

1. B. owes C. 50*l.* In order to pay C., A. at B.'s request, draws a bill on B. for 50*l.* in favour of C. C. is a holder for value and can sue A., though A. has received no value.⁹

2. A. draws a bill on B. payable to his own order. B. to accom-

¹ *Currie v. Misa* (1875), 10 L. R. Ex. at 162, per Lush, J.

² *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616, H. L.; *Earl v. Peck* (1876), 64 New York R. 596.

³ *Jones v. Gordon supra*, per Ld. Blackburn at 632.

⁴ *Id.*; Cf. *Allen v. Davis* (1850), 20 L. J. Ch. 44; *Simon v. Cridland* (1862), 5 L. T. N. S. 524.

⁵ *Dresser v. Missouri Co.* (1876), 3 Otto. 92 Sup. Ct. U. S.

⁶ *Aylesford v. Morris* (1873), 8 L. R. Ch. 484; *Nevill v. Scolling* (1880), 15 Ch. D. 679.

⁷ *Maitland v. Backhouse* (1847), 16 Sim. 58; *Kempson v. Ashby* (1874), 10 L. R. Ch. 15.

⁸ *Hunter v. Wilson* (1849), 4 Exch. 489.

⁹ *Scott v. Lifford* (1808), 1 Camp. 246.

modate A. accepts it. Subsequently A. gives value to B. A. is a Holder of value.¹
holder for value.¹

Explanation 1.—It is immaterial that the value is given by or to a person who never signed the instrument, or whose signature has been struck out.²

ILLUSTRATIONS.

1. B. makes a note in favour of C. C. is the treasurer of a loan society, and the consideration for the note is money advanced by the society to B. C. is a holder for value.³

2. C. the holder of a bill indorses it in blank to D., receiving no value. D. for value transfers it by delivery to E. E. is a holder for value.⁴

3. A. at the request of X. draws a bill payable to C. for X.'s account with C. X. remits the bill to C. C. is a holder for value. It is immaterial that there is no consideration between A. and X., or that the consideration fails.⁵

4. S., in the West Indies, is indebted to C. in Paris. In order to pay him S. remits money to X., his correspondent in London, who thereupon obtains a bill for the amount, drawn by A. upon Paris, payable to C.'s order. X. remits the bill to C., but fails before he pays A. for it. S. subsequently pays C. C. is a holder for value, and can sue A.⁶

NOTE.—In Illust. 4, C. would be trustee for S. As to the effect of this see Art. 141. *Sale of Bill.*—In legal language a bill is said to be sold when it is transferred by delivery without indorsement. Not so in mercantile language. Suppose X. in London wishes to pay 1000 rupees to C. in India. X. goes to A., who has a correspondent in Calcutta, and gets him to draw a bill on Calcutta for Rs. 1000. Usually the bill is drawn payable to C., but sometimes it is drawn payable to X., who then indorses it to C. The amount paid by X. to A. for this bill depends on the rate of exchange between London and Calcutta on the day of the transaction. In some trades the custom is for X. to pay A. when he gets the bill; in other trades it is the custom not to pay till the next mail day.

¹ *Burdon v. Benton* (1847), 9 Q. B. 843.

² Cf. *Fairclough v. Pavia* (1854), 9 Exch. 690 (signature struck out).

³ *Lomas v. Bradshaw* (1850), 19 L. J. C. P. 273.

⁴ *Barber v. Richards* (1851), 6 Exch. 63.

⁵ *Munroe v. Bordier* (1849), 8 C. B. 862; *Watson v. Russell* (1862) 3 B. & S. 34; 5 B. & S. 968, Ex. Ch.

⁶ *Porier v. Morris* (1853), 2 E. & B. 89.

Holder for value. Such a transaction is called a sale of the bill by A. to X. X. the buyer, who sends the bill out to India, is called the Remitter. As to fixing the rate of exchange at which a bill is to be sold, see Art. 13, Expl. 1.

See, too, the judgment of Wood, V.-C., explaining the practice of paying for bills partly by cash, partly by bankers' "marginal notes."¹

Explanation 2.—Subject to Art. 84, the fact that the holder of a bill is the creditor of the person from whom he received it does not make such holder a holder for value unless he received it in respect of his debt.²

Explanation 3.—A holder for value may or may not be a *bonâ fide* holder for value without notice.³

Explanation 4.—The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he received it.

ILLUSTRATION.

C., the payee of a bill, holds it for value. He indorses it to D. without value, *e.g.*, by way of gift or for collection. D. is, as regards the drawer and acceptor, a holder for value.⁴

Pledge or lien.

Art. 84. A holder who has a lien on a bill, arising either from agreement or by implication of law, is deemed to be a holder for value to the extent of the sum for which he has a lien.

Explanation.—A bill is *primâ facie* presumed to have been negotiated to the holder for value, and

¹ *Jeffreys v. Agra Bank* (1866), 2 L. R. Eq. 676; Cf. *Ex parte Kemp* (1874), 9 L. R. Ch. 383.

² *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208; explained by *Currie v. Misa* (1875), 10 L. R. Ex. at 164 Ex. Ch.

³ *Raphaël v. Bank of England* (1855), 17 C. B. at 172; Cf. Arts. 86 and 98.

⁴ *Milnes v. Dawson* (1850), 5 Exch. 948; Cf. *Denton v. Peters* (1870), 5 L. R. Q. B. at 477; and Art. 141.

not to have been pledged or deposited as collateral security.¹ Pledge or
lien.

ILLUSTRATIONS.

1. D. holds a bill indorsed in blank as agent for C. : D. wrongfully pledges it with E. E. is a holder for value to the extent of the sum he advanced, and if he took the bill without notice of the fraud, he can retain the bill as against C. the true owner.²

2. C., the holder of a bill for 100*l.*, deposits it with D. as security for a running account. At the time the bill matures the balance is in C.'s favour, but subsequently the balance turns against him to the extent of 50*l.* D. is a holder for value as to 50*l.*³

3. C., the holder of a bill for 100*l.*, indorses it to D. as a pledge for 50*l.* D. is a holder for value as to 50*l.*, and this is the sum he can recover if he sues C.⁴

4. C. keeps with his bankers a loan account and a general account. C. indorses to the bank, as collateral security for his loan account, a bill for 1000*l.*, and draws against it to the extent of 500*l.* C. becomes bankrupt, and his general account is overdrawn more than 500*l.* The bank are holders of the bill for full value.⁵

5. The drawer of a bill for 100*l.* which has been accepted for his accommodation, indorses it to C. as a security for 50*l.* If the acceptor becomes bankrupt, C. can tender a proof for 100*l.*, but can only receive dividends to the extent of 50*l.*⁶

6. A bill indorsed by a customer to his banker and entered "short," remains the property of the customer, though the banker may have a lien on it.⁷

NOTE.—The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security.⁸ A "discount" is a

¹ *Hills v. Parker* (1866), 14 L. T. N. S. 107; *Re Boys* (1870), 10 L. R. Eq. 467.

² *Collins v. Martin* (1797), 1 B. & P. 648.

³ *Attwood v. Crowdie* (1816), 1 Stark, 483; Cf. *Pease v. Hirst* (1829), 10 B. & C. 122; *Gray v. Seckham* (1872), 7 L. R. Ch. at 683.

⁴ *Attenborough v. Clarke* (1858); 27 L. J. Ex. 138.

⁵ *Re European Bank* (1872), 8 L. R. Ch. 41.

⁶ *Ex parte Newton* (1880), 16 Ch. D. 330, C. A.

⁷ *Thompson v. Giles* (1824), 2 B. & C. 422.

⁸ *Ex parte Twogood* (1812), 19 Ves. 229; *Re Gomersall* (1876), 1 L. R. Ch. D. at 142; *Ex parte Schofield* (1879), 12 Ch. D. 337, C. A., bills indorsed "pending discount."

Pledge or lien. holder for full value.¹ The position of a pledgee is this: If he sue a third party he sues as trustee for the pledgor, as regards the difference between the amount he has advanced and the amount of the bill.² If the pledgor could have sued on the bill, the pledgee can recover the whole. If the title of the pledgor is defective, the pledgee can recover the amount of his advance, provided he took the bill without notice (Cf. Art. 85). Like any other bailee, the pledgee of a bill must use due diligence with reference to it, having regard to the peculiar nature of the thing bailed. *e.g.*, he must not part with it: he must if he can collect it at maturity; if he cannot, he must give the proper notices of dishonour.³

Bankers' Lien.—A lien is “an implied pledge.”⁴ A banker has, in the absence of agreement to the contrary, a lien on all bills received from a customer in the ordinary course of banking business in respect of any balance that may be due from such customer.⁵ If the banker knows that the bills do not belong to his customer, no lien can attach.⁶ A broker who deals in bills has a lien similar to a banker’s.⁷

Bonâ fide
holder for
value with-
out notice.

Art. 85.—A “*Bonâ fide* holder for value without notice” is a holder for value who, at a time he becomes the holder and gives value, is in fact without notice of any circumstances which, if known, would defeat his title to the bill.⁸

ILLUSTRATIONS.

1. C., the holder of a bill payable to his order, transfers it to D. for value, but without indorsing it. C. has obtained this bill by fraud, but D. has no notice of this. D. is not a *bonâ fide* holder.⁹

2. C., who resides abroad, transmits to D., his agent in England, a bill for collection. C. has obtained this bill by fraud, but D. does not know it. At the time D. receives the bill, C. is

¹ *Id.*; Cf. *Thiedman v. Goldsmidt* (1859), 1 De G. F. & J. at 11.

² *Reid v. Furnival* (1833), 1 Cr. & M. 538. Cf. Art. 141.

³ *Peacock v. Purcell* (1863), 32 L. J. C. P. 266.

⁴ *Brandao v. Barnett* (1846), 3 C. B. at 531, H. L.

⁵ *Id.*; *London Chartered Bank of Australia v. White* (1879), 4 App. Cas. 413, P. C.; *Johnson v. Roberts* (1875), 10 L. R. Ch. 505, where customer was a country bank; *Currie v. Misa* (1876), 1 L. R. Ap. Ca. at 569, H. L.

⁶ *Ex parte Kingston* (1871), 6 L. R. Ch. 632.

⁷ *Jones v. Peppercorn* (1858), John. 430.

⁸ *Raphael v. Bank of England* (1855), 17 C. B. 161; Cf. *Whistler v. Forster* (1863), 14 C. B. N. S. at 258.

⁹ Art. 104. *Whistler v. Forster* (1863), 14 C. B. N. S. at 258.

indebted to him on the balance of account. D. is not a *bonâ fide* holder for value. He cannot recover on the bill—*aliter* if C. had transmitted the bill to D. in payment of his debt.¹

Bonâ fide
holder for
value with
out notice

3. C. indorses to D. a bill for 100*l.* to be paid for by two instalments of 50*l.* At the time D. gets the bill he pays one instalment. Before D. pays the second instalment, he receives notice that C. obtained the bill by fraud. D. subsequently pays the second instalment. D. (probably) is a *bonâ fide* holder to the extent of 50*l.* only, and that is the sum he is entitled to recover on the bill.²

NOTE.—The terms "*bonâ fide* holder," "innocent indorsee," &c., are used in the cases as synonymous with "*bonâ fide* holder for value without notice." The French equivalent, "*tiers porteur de bonne foi*," i.e. "third party holder in good faith," well expresses the idea.

Art. 86. Notice means actual notice—i.e., either knowledge of the facts or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge.³ If, as a fact a bill is taken for value and without notice, it is immaterial that the holder took it under circumstances which show gross negligence.⁴

ILLUSTRATION.

D. the holder of a bill indorsed in blank transfers it to E. for value. E. suspects that D. had obtained the bill by a false representation, and consequently makes no inquiries. As a fact, D. stole the bill. E. is not a *bonâ fide* holder, he is affected with notice.⁵

Exception.—The fact that a bill is overdue (Art.

¹ *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208 as explained by *Currie v. Misa* (1875), 10 L. R. Ex. at 164, Ex. Ch.

² *Dresser v. Missouri Co.* (1876), 3 Otto. 92, Sup. Ct. U. S. Cf. Art. 98 n.

³ *Raphael v. Bank of England* (1855), 17 C. B. at 174; *Oakley v. Odeon* (1861), 2 F. & F. at 659; *Re Gomersall* (1875), 1 L. R. Ch. D. at 144.

⁴ *Goodman v. Harvey* (1836), 4 A. & E. at 876; *Swan v. North British Co.* (1863), 2 H. & C. at 184, 185.

⁵ Cf. *Jones v. Gordon* (1877), 2 App. Cas. at 628, H. L.

Notice. 134), or that there is an irregularity patent on the face of it (Art. 138), operates as notice.

NOTE.—*Test of bona fides*.—This has varied greatly. Previous to 1820 the law was much as at present, but under the influence of Lord Tenterden, due care and caution was made the test.¹ In 1834 the King's Bench held that nothing short of gross negligence could defeat the title of a holder for value.² Two years later Lord Denman states it as settled law that bad faith alone could disentitle a holder for value. Gross negligence might be evidence of bad faith, but was not conclusive of it.³ This principle has never since been shaken in England, and it seems now finally established in America.⁴ *Principal and Agent*.—As regards the parties affected with notice the ordinary rules of law apply to bills. Notice to the principal is notice to the agent; and notice to the agent is notice to the principal⁵ subject to this: when the agent is himself a party to a fraud, he is not to be taken to have disclosed it to his principal.⁶ Again, when a bill is negotiated to an agent and notice is given to the principal, or *vice versa*, there must be a reasonable time for communication.⁷

Holder
claiming
under
bona fide
holder.

Art. 87. A holder who derives his title to a bill through a *bona fide* holder for value without notice has all the rights of such *bona fide* holder against the acceptor and all prior parties, although he himself may have given no value, and may be affected with notice.⁸ Cf. Art. 134, Expl. 2.

ILLUSTRATIONS.

1. C., a partner in a firm, fraudulently indorses a firm bill to D. in payment of a private debt. F. is cognizant of the fraud, but is not a party to it. D. indorses the bill to E., who takes it for

¹ Cf. *Gill v. Cubitt* (1824), 5 D. & R. 324.

² *Crook v. Jadis* (1834), 5 B. & Ad. 909.

³ *Goodman v. Harvey* (1836), 4 A. & E. at 876.

⁴ *Murray v. Lardner* (1864), 2 Wallace, at 121, Sup. Ct. U. S.; *Chapman v. Rose* (1874), 56 New York, at 140.

⁵ Cf. *Collinson v. Lister* (1852), 7 De G. M. & G. at 637, branch bank.

⁶ *Ex parte Oriental Bank* (1870), 5 L. R. Ch. 358.

⁷ Cf. *Willis v. Bank of England* (1835), 4 A. & E. at 39.

⁸ *May v. Chapman* (1847), 16 M. & W. 355 at 361; *Masters v. Iverson* (1849), 8 C. B. 100; *Marion County v. Clark* (1876), 4 Otto. 278, Sup. Ct. U. S.

value and without notice. E. indorses it to F. F. acquires E.'s Holder rights. If he gave value to E., he can sue all the parties to the bill; if he did not give value, he can sue all parties claiming under bond fide holder. except E.¹

2. C., by fraud, induces B. to make a note in his favour. C. indorses the note to D., who takes it for value and without notice. Subsequently D. indorses the note for value back to C. C. cannot sue B.²

Art. 88. Any defence available against an immediate party is available against a remote party who is in privity with such immediate party. Immediate and remote parties.

Explanation 1.—"Immediate parties" are parties in direct relation with each other. All other parties are remote. *Primâ facie*, the drawer and acceptor, the drawer and the payee, the indorser and his indorsee, are in direct relation.

ILLUSTRATIONS.

1. A. draws a bill on B. payable to C., and delivers it to the latter. B. accepts the bill while in C.'s hands. B. and C. are remote parties.³

2. B. makes a note payable to C. *Primâ facie* B. and C. are immediate parties; but if it appear that B. made the note at the request of X. under the belief that he had done something which he had not done, and that X. on his own account delivered the note to C., who gave value and took it without notice, then B. and C. are remote parties.⁴ *Aliter* if X. had been C.'s agent.⁵

Explanation 2.—Privity is created in all cases by want of consideration, and in some cases by notice: it may also be created by agreement.

NOTE. 1.—The holder of a bill who has not himself given value is, as regards third parties, deemed to be the agent of the party

¹ *May v. Chapman* (1847), 16 M. & W. 355.

² *Cf. Sawyer v. Wisewell* (1864), 91 Massachus. at 42.

³ *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch.

⁴ *Cf. Watson v. Russell* (1862), 3 B. & S. 34.

⁵ *Astley v. Johnson* (1860), 5 H. & N. 137.

Immediate and remote parties. from whom he received it, whatever their private relations may be.¹ 2. Notice creates privity when it is notice of defective title in the party from whom the bill is taken, i.e., notice that he had no right to hold the bill or no right to part with it.² Title to a bill must be distinguished from the right to enforce payment of it against particular parties—e.g., the donee of a bill has a good title though he could not enforce payment against the donor.³ Whenever a bill is held adversely to the true owner, and there is privity between the true owner and the *de facto* holder, a third party if sued, may set up the *jus tertii*.⁴ 3. Again, when a person expressly or impliedly agrees to hold a bill as agent or trustee for another person, he holds it subject to all defences against the person for whom he holds, irrespective of the state of accounts between them.⁵

Presumption of value. Art. 89. Every party to a bill is *prima facie* deemed to have become a party thereto for value.⁶

Accommodation bill or party. Art. 90. "Accommodation bill" means a bill whereof the acceptor (i.e., the principal debtor on the instrument) is substantially a mere surety for some other person who may or may not be a party thereto.⁷

"Accommodation party" means a person who has signed a bill as drawer, indorser, or acceptor, without receiving value, and for the purpose of lending his name to some other person.

ILLUSTRATIONS.

1. A draws a bill on B. B. accepts it to accommodate A. It is negotiated. This is an accommodation bill.⁸

¹ Cf. *Fitch v. Jones* (1855), 5 E. & B. at 246, and cases quoted in Art. 97; also *Lee v. Hayes* (1865), 17 Ir. C. L. at 408.

² See e.g., Arts. 23, 51, 55, 134.

³ See e.g., Art. 83, Expl. 4, and Arts. 91, 134, 141.

⁴ See e.g., Arts. 55 and 94.

⁵ *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained *Currie v. Misa* (1875), 10 L. R. Ex. at 164, Ex. Ch.

⁶ Cf. *Hatch v. Traves* (1840) 11 A. & E. 702; *Foster v. Dauber* (1851), 6 Exch. at 853.

⁷ Cf. *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. at 146 and 151; and 7 L. R. H. L. at 358; *Ex parte European Bank* (1871), 7 L. R. Ch. 99.

⁸ *Collott v. Haigh* (1812), 3 Camp. 281.

CONSIDERATION.

2. A. draws and indorses, and B. accepts, a bill for the accom- Accommodation of X., who is not a party thereto. A. and B. receive a dation 1 commission for so doing. This is an accommodation bill.¹ or party

3. A draws a bill on B. against a running account. B. accepts. This is not an accommodation bill, although the balance may have been against A. when the bill was drawn or accepted, or payable.²

4. A. draws a bill on B. in favour of C. It appears that B. was indebted to C., and that A. drew the bill to accommodate B. This is not an accommodation bill, though A. is an accommodation drawer.³

5. A. draws a bill on B. B. accepts for value. C., whose name is well known, indorses the bill to give it currency. This is not an accommodation bill, but C. is an accommodation indorser.⁴

Explanation.—An accommodation party known to be such, may avail himself of any defence arising out of the bill transaction which the person accommodated could have set up.⁵

ILLUSTRATION.

B. and X. make a joint and several note payable to C. B. signs as maker to accommodate X. C. takes the note knowing this. If C. sue B., B. can set off a debt due from C. to X.⁶

NOTE.—A bill which is signed by one or more accommodation parties is frequently called an accommodation bill, but the definition given above is believed to be more strictly correct. The distinction becomes of importance when questions arise as to what is or is not a discharge of the bill, *e.g.*, payment by person accommodated, or the giving of time to such person. See, too, Arts. 168, 245.

Art. 91. Mere absence of consideration, total or Absence of value. partial is matter of defence against an immediate party or a remote party, who is not a holder for

¹ *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142.

² *Ex parte Swan* (1869), 6 L. R. Eq. at 356; Cf. *Wilks v. Hornby* (1862), 10 W. R. 742.

³ *Scott v. Lifford* (1808), 1 Camp. 246; Cf. *Sleigh v. Sleigh* (1850), 5 Exch. 512.

⁴ Cf. *Re Nunn* (1817), Buck. 113. This practice is not uncommon in the case of foreign bills: see *e.g.*, *Société Générale v. Met. Bank* (1873), 27 L. T. N. S. 849.

⁵ *Bechervaise v. Lewis* (1872), 7 L. R. C. P. 372, at 377.

⁶ *Id.* See *Murphy v. Glass* (1869), 2 L. R. P. C. 406.

Absence
of value.

value, but it is not a defence against a remote party who is a holder for value.¹

Explanation.—An accommodation party is liable to a holder for value, who takes a bill knowing him to be such.²

ILLUSTRATIONS.

1. B., by way of gift, makes a note in favour of C. C. cannot sue B.³

2. C., the holder of a bill for value, indorses it to D. by way of gift. The property in the bill passes to D., but he cannot sue C.⁴

3. A. draws a bill on B. for 100*l.* B. accepts it to accommodate A. A. discounts it with C., who knows that it is an accommodation bill. C. can sue A. or B. for 100*l.* ;⁵ but if C., instead of discounting it, merely advanced 50*l.* on it, he can only recover 50*l.*⁶

4. B. owes A. 50*l.* A. draws a bill on B. for 100*l.* B., to accommodate A. and at his request, accepts it. If A. sue B. he can recover only 50*l.*⁷

5. C. is D.'s agent abroad. C. purchases a bill for D. The bill is made payable to C.'s order, and he indorses it to D. This is done merely for the purpose of safe transmission, and not to guarantee the bill. If the bill is dishonoured, C. is not liable to D. as indorser.⁸

6. A. and C. supply goods to B. A. draws a bill on B. for the price, and indorses it to C. to collect on joint account. If the bill is dishonoured, A. is not liable to C.⁹

7. B. accepts a bill drawn by A., to accommodate him. A. indorses it to C. without receiving value. C. indorses it to D.

¹ Cf. *Forman v. Wright* (1851), 11 C. B. at 492.

² *Scott v. Lifford* (1808), 1 Camp. 246 ; Cf. *Strong v. Foster* (1855), 17 C. B. at 222 ; *Petty v. Cooke* (1871), 6 L. R. Q. B. 790 ; and Arts. 83, 90.

³ *Holliday v. Atkinson* (1826), 5 B. & C. 501.

⁴ *Easton v. Pratchett* (1835), 1 C. M. & R. at 808 ; Cf. *Milnes v. Dawson* (1850), 5 Exch. 948.

⁵ Cf. *Mills v. Barber* (1836), 1 M. & W. 425 ; *Sturtevant v. Ford* (1842), 4 M. & Gr. 101.

⁶ *Nash v. Brown* (1817), cited Chitty, 11 ed. p. 60 ; *Jones v. Hibbert* (1817), 2 Stark. 304 ; *Ex parte Newton* (1880), 16 Ch. D. 330, C. A., proof.

⁷ *Darnell v. Williams* (1817), 2 Stark. 166.

⁸ *Castrique v. Buttlegieg* (1855), 10 Moore P. C. 110 ; Cf. *Re Nunn* (1817), Buck. 113.

⁹ *Denton v. Peters* (1870), 5 L. R. Q. B. 475.

without receiving value. D. cannot recover from B., but it lies on B. to show that neither D. nor any intervening holder was a holder for value.¹ Absence of value.

NOTE.—Although the donee of a bill cannot sue the donor on the instrument, the making of the note may nevertheless constitute a valid declaration of trust in favour of the donee.²

Art. 92. Total failure of consideration is a defence against an immediate party, but it is not a defence against a remote party who is a *bond fide* holder for value without notice.³ Total failure of value.

ILLUSTRATIONS.

1. B. makes a note payable to C. The only consideration is that C. is to act as B.'s executor. C. dies first. His personal representatives cannot enforce payment against B.⁴

2. B. authorises A. to draw on him against bills of lading. A. draws a bill on B. and indorses it to C. with the bill of lading attached. C. gives value to A. B. accepts the bill on receiving from C. the bill of lading. The bill of lading turns out to be a forgery, but C. did not know it when he obtained the acceptances. C. can sue B.⁵

3. A. draws a bill at three months on B. in favour of C., to be paid for in seven days. B., who is A.'s agent, accepts on his account. C. does not pay A. He cannot sue B.⁶

4. A. draws a bill on B. payable to his own order. B. accepts. The consideration between A. and B. fails. A. subsequently indorses the bill for value to C., who knows that the consideration between A. and B. has failed. C. cannot sue B.⁷

NOTE.—Failure of consideration, it seems, is a defence against a remote holder for value with notice. The reason probably is that

¹ *Mills v. Barber* (1836), 1 M. & W. 425; Cf. *Thompson v. Clubley* (1836), 1 M. & W. 212.

² *Arthur v. Clarkson* (1865), 35 Beav. 458.

³ *Robinson v. Reynolds* (1841), 2 Q. B. at 211, Ex. Ch. As to what amounts to total failure, *Wells v. Hopkins* (1839), 5 M. & W. 7; *Hooper v. Treffery* (1847), 1 Exch. 17.

⁴ *Solly v. Hinde* (1834), 2 Cr. & M. 516.

⁵ *Robinson v. Reynolds* (1841), 2 Q. B. 196, Ex. Ch.; Cf. *Leather v. Simpson* (1871), 11 L. R. Eq. 398.

⁶ *Astley v. Johnson* (1860), 5 H. & N. 137.

⁷ *Lloyd v. Davies* (1824), 3 L. J. K. B. 38; Cf. *Fairclough v. Pavia* (1854), 9 Exch. 690 (same principle assumed).

Total
failure of
value.

it is in the nature of a fraud to negotiate a bill when the holder knows that the consideration on which he received it has failed.¹ But might there not be cases in which it would not be a fraud to do so? Again, *qu.* as to the effect of failure of consideration after the maturity of the bill, *i.e.*, after a cause of action has accrued?² When the consideration for a bill fails, the Court will usually restrain its negotiation by injunction.³

Partial
failure of
value.

Art. 93. Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise.⁴ It is not a defence against a remote party who is a holder for value.⁵

ILLUSTRATIONS.

1. B. accepts a bill for 100*l.* drawn by A. This is the agreed price of goods to be supplied by A. to B. When the goods arrive they are found to be inferior to sample, and worth only 80*l.* B. retains the goods. If A. sue B. on the bill, this is not a defence *pro tanto*.⁶ But B. could now counter claim.

2. B. accepts a bill for 100*l.* This is the agreed price of two bales of cotton to be supplied by A. to B. A. only delivers one bale. A. indorses the bill to C. his agent to collect. C. can only recover 50*l.*⁷

3. B. accepts a bill drawn by A. for 100*l.* This is the agreed price of two bales of cotton to be supplied by A. to B. When the cotton arrives, one bale is found to be inferior to sample and is returned as useless. A. indorses the bill to C. without value. If C. sues B. he can only recover 50*l.*, the price of the one bale which is kept.⁸

NOTE.—In some cases of partial failure of consideration, the

¹ Cf. *Oulds v. Harrison* (1854), 10 Exch. at 579.

² Cf. *Watson v. Russell* (1864), 5 B. & S. at 968.

³ Cf. *Patrick v. Harrison* (1792), 3 Bro. C. C. 476; *Bainbridge v. Hemingway* (1865), 12 L. T. N. S. 74.

⁴ *Day v. Nix* (1824), 9 Moore, 159; *Warwick v. Nairn*, (1855), 10 Exch. 762.

⁵ *Archer v. Bamford* (1822), 3 Stark. 175.

⁶ *Glennie v. Imri* (1839), 3 Y. & C. 436.

⁷ Cf. *Agra Bank v. Leighton* (1866), 2 L. R. Ex. at 64, 65.

⁸ Cf. *Agra Bank v. Leighton* (1866) 2 L. R. Ex. at 64, 65.

Court would perhaps restrain the holder from negotiating the bill after notice.¹ Partial failure of value.

Art. 94. Fraud is a defence against an immediate party and against a remote party who is not a *bond fide* holder for value without notice.² Fraud or duress.

Explanation 1.—A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud,³ or coercion,⁴ or when it is negotiated in breach of faith,⁵ or in fraud of third parties.⁶

Explanation 2.—The holder of a bill subsequent to a fraud, who is not a *bond fide* holder for value without notice, cannot enforce payment against any party thereto, neither can he retain the bill against the true owner.⁷

NOTE.—When the consideration for a bill is clearly fraudulent, and it is in the hands of a party with notice, the Court will order it to be given up at once. When only a *prima facie* case of fraud is made out, the Court will restrain the negotiation of the bill for a specified time, in order that the question may be tried.⁸

Where a party sued on a bill sets up the *jus tertii*, e.g. if the acceptor when sued by an indorsee sets up that the indorsee obtained the bill by fraud from his immediate indorser, it seems the nature of the fraud must also be looked at. If the indorser never intended by his indorsement to pass the property in the bill to the indorsee the *jus tertii* alone is a good defence;⁹ but if the

¹ Cf. *Jacobson v. Shanks* (1866), 12 Jur. N. S. 917.

² Arts. 85 and 137; *Whistler v. Forster* (1863), 14 C. B. N. S. at 258.

³ *Wienholt v. Spitta* (1813), 3 Camp. 376; *Dawes v. Harness* (1875), 10 L. R. C. P. 166.

⁴ As to duress *Duncan v. Scott* (1807), 1 Camp. 100 (*onus probandi*); *Kearns v. Durrell* (1857), 6 C. B. 596; *White v. Heylman* (1859), 34 Pennsylv. R. 143; *Loomis v. Ruck* (1874), 56 New York B. 462.

⁵ *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63; Cf. Art. 55.

⁶ *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 616, H. L.

⁷ Id. *Lloyd v. Howard*, *supra*; *Alsager v. Closs* (1842), 10 M. & W. 576.

⁸ Joyce on Injunctions, p. 369; and see *Jones v. Lane* (1829), 3 Y. & C. at 298.

⁹ *Lloyd v. Howard* (1850), 15 Q. B. 995; *Barber v. Richards* (1851), 6 Exch. 63.

Fraud or duress. indorser intended to pass the property in the bill to the indorsee, though he was induced to do so by fraud, it seems the acceptor must go on to show that the indorser has disaffirmed the transaction,¹ for fraud renders a contract voidable not void.

Illegal consideration. Art. 95. Illegality of consideration, total or partial, is a defence against an immediate party or a remote party who is not a *bond fide* holder for value without notice.²

Explanation.—The consideration for a bill is illegal when it is wholly or in part immoral, contrary to public policy, or forbidden under penalties by statute.³

NOTE.—When old cases are referred to it is important to notice whether the consideration was simply illegal, or whether it was a consideration which by statute expressly made the bill void. Again, an illegal consideration must be distinguished from a merely void consideration.⁴ In America it has been held that if B. for value make a note payable to C., and C. for an illegal consideration indorse it to D., then D. can sue B. though he could not sue C.⁵

Bills void by statute. Art. 96.—When a bill is given for a consideration which by statute expressly makes it void, it is as against the party who gave it void in the hands of all parties whether immediate or remote.⁶

ILLUSTRATION.

A. draws a bill on B. payable to his own order. B. accepts it for a consideration which by statute avoids it. A. indorses it to C., who takes it for value and without notice. C. can sue A.,⁷ but he cannot sue B.⁸

NOTE.—Most if not all the statutes which expressly avoided

¹ *Dawes v. Harness* (1875), 10 L. R. C. P. 166. So held in America. *Froultz v. Roberts* (1850), 69 Massachus. R. 19; *Carrier v. Sears* (1862), 86 Massachus. 336.

² *Hay v. Ayling* (1851), 16 Q. B. at 431.

³ Cf. *Fitch v. Jones* (1855), 5 E. & B. 238.

⁴ *Id.*, and *Belfast Bank v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

⁵ *Armstrong v. Gibson* (1872), 11 Amer. R. 599.

⁶ *Edwards v. Dick* (1821), 4 B. & Ald. 212; *Skillico v. Theed* (1831), 7 Bing. 405.

⁷ *Edwards v. Dick* (1821), 4 B. & Ald. 212.

⁸ *Id.*; *Reed v. Wiggins* (1862), 13 C. B. N. S. 220.

bills are now repealed, *e.g.*, the laws relating to usury and stock-jobbing. By 5 & 6 Will. 4, c. 41, § 1, bills and notes given for wagers or gaming are not to be void, but are to be deemed to be given for an illegal consideration; and sec 8 & 9 Vict. c. 109. In many American States usury laws still prevail.

Art. 97. The holder of a bill is *prima facie* deemed to be a *bona fide* holder for value without notice;¹ but if in an action on a bill it is admitted or there is evidence² that the issue or subsequent negotiation of such bill is affected with fraud or illegality, the *onus probandi* as to value is shifted, and the holder is called upon to prove that he is a holder for value.³

ILLUSTRATIONS.

1. A. draws a bill on B. and indorses it to C. C. sues B. It is shewn that B. accepted it for A.'s accommodation. C. is not called on to prove that he gave value, he can recover without so doing.⁴

2. B. makes a note payable to C. C. indorses it to D., who sues B. If it appears that B. made the note for an illegal consideration, D. must prove that he gave value.⁵

3. The holder of a bill indorses it to D. to get it discounted. D. fraudulently negotiates it to E., who negotiates it to F. F. sues the acceptor. Evidence is given of D.'s fraud. F. must prove that he is a holder for value.⁶

4. B. makes a note payable to C., the consideration for which is a wager, *i.e.*, a consideration void by statute, but not prohibited under a penalty. C. indorses it to D., who sues the maker. Evidence is given of these facts. D. is not called on to prove that he gave value.⁷

5. Action against the maker of a note payable to bearer. It is

¹ *King v. Milsom* (1809), 2 Camp. 6.

² *Hall v. Featherstone* (1858), 3 H. & N. at 286 (evidence to go to a jury).

³ *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. at 627, 628, H. L.

⁴ *Mills v. Barber* (1836), 1 M. & W. 425.

⁵ *Bailey v. Bidwell* (1844), 13 M. & W. 73.

⁶ Cf. *Smith v. Braine* (1851), 16 Q. B. 244; *Berry v. Alderman* (1853), 14 C. B. 95.

⁷ *Fitch v. Jones* (1855), 5 E. & B. 238; *Belfast Banking Co. v. Doherty* (1879), 4 Ir. L. R. Q. B. D. 124.

Presump-
tion of
value and
bona fides
may shift.

shown to have been stolen from the true owner. It lies on the holder to prove that he gave value.¹

6. An acceptance is given in renewal of a bill which turns out to be a forgery. The genuine bill is negotiated, and the holder sues the acceptor. Evidence is given of these facts. It lies on the holder to prove that he is a holder for value.²

7. A partner accepts a bill in the firm's name for a private debt and in fraud of his co-partners. The bill is negotiated. The holder sues the firm as acceptors. As soon as it appears that the bill was given for a private debt, the holder is called upon to prove that he is a holder for value.³

NOTE.—If the holder show that he is a holder for full value, it lies on the defendant to show that he took the bill with notice, for the presumption of *bona fides* is re-established;⁴ but what if the holder did not give full value? In America it is held that if the holder has in good faith given partial value, he may recover *pro tanto*.⁵ Probably the same would be held in England.

¹ *Raphael v. Bank of England* (1855), 17 C. B. 161.

² *Mather v. Maidstone* (1856), 1 C. B. N. S. 273.

³ *Hogg v. Skeen* (1865), 18 C. B. N. S. 426.

⁴ *Raphael v. Bank of England* (1855), 17 C. B. 161; but cf. *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. at 628.

⁵ *Holcomb v. Wyckoff* (1870), 10 Amer. R. 219; *Dresser v. Missouri Co.* (1876), 3 Otto. 92, Sup. Ct. U. S.

CHAPTER IV.

TRANSFER.

Transmission by Act of Law.

Art. 98. If a bill be held by an unmarried woman ^{Marriage.} who subsequently marries, or if a bill be made payable to a married woman, the title thereto vests in the husband, provided he reduce it into possession.¹

Explanation 1.—If the husband dies without having reduced the bill into possession the title thereto reverts to the wife if she be alive, and passes to her personal representatives if she dies before her husband.²

Explanation 2.—During the marriage, the husband is for all purposes deemed to be the holder of a bill payable to the order of his wife, whether it was made payable to her before or after the marriage.³

ILLUSTRATIONS.

1. Bill payable to the order of C., a single woman. C. marries D. C., after marriage, indorses the bill to E. without her husband's

¹ Cf. *Fleet v. Perrins* (1868), 3 L. R. Q. B. at 541, affirmed 4 L. R. Q. B. 500. As to what is or is not a reduction of a bill into possession : Cf. *Nash v. Nash* (1817), 2 Mad. 133 ; *Sherrington v. Yates* (1844), 12 M. & W. 855, esp. at 865, Ex. Ch. ; *Hart v. Stephens* (1845), 6 Q. B. 937 ; *Scarpelini v. Atcheson* (1845), 7 Q. B. at 875—876 ; *Latourette v. Williams* (1847), 1 Barb. 9. New York. *Parker v. Lechmere* (1879), 12 Ch. D. 256.

² *Hart v. Stephens* (1845), 6 Q. B. 937 ; *Williams on Executors*, 7th ed., pp. 848—852.

³ Cf. *McNeilage v. Holloway* (1818), 1 B. & Ald. 218.

Marriage. consent. The indorsement is invalid :¹ but D. could validly indorse the bill, using his own name.²

2. A note is made payable to the order of C., a married woman. Her husband indorses it in his own name. This is a valid indorsement.³

NOTE.—When a bill is made payable to the order of a married woman, the husband may sue on it in his own name alone, or if he likes he may join his wife.⁴ When a bill is payable to the order of a single woman, who subsequently marries, both husband and wife should join in an action on it ; but it has once been held that the husband may sue alone.⁵

Exception.—Bill forming part of wife's separate estate.⁶

Death. Art. 99. On the death of the holder of a bill the title thereto passes to his personal representatives, (executors or administrators, as the case may be).⁷

ILLUSTRATIONS.

1. C., the holder of a bill payable to order, dies. His administrator can enforce payment of it or indorse it away, using his own name.⁸

2. C., the holder of a bill payable to order, dies, having specifically bequeathed it to X. X. cannot sue on it or indorse it away, unless he first obtain an indorsement of the bill to him by C.'s executor.

NOTE.—An executor or administrator who indorses a bill should, in express terms, exclude personal liability, see Art. 76 ; and as he is not the agent of the deceased he cannot by his delivery complete an indorsement written by the latter. He must indorse it *de novo*, see Art. 54. When there are two or more executors, the

¹ *Connor v. Martin* (1746), cited 3 Wils. at 5.

² *Roberts v. Place* (1846), 18 New Hamp. R. 183.

³ *Mason v. Morgan* (1884), 4 N. & M. 46 ; Cf. *Smith v. Marsack* (1848), 6 C. B. 486 at 503.

⁴ *Fleet v. Perrins* (1868), 3 L. R. Q. B. at 541.

⁵ *McNeillage v. Holloway* (1818), 1 B. & Ald. 218 ; but cf. *Sherrington v. Yates* (1844), 12 M. & W. at 865, Ex. Ch.

⁶ *Green v. Carlill* (1877), 4 L. R. Ch. D. 882, and Arts. 65, 66 ; Cf. Art. 81, Excep. 2.

⁷ *Williams on Executors*, 7th ed., 786.

⁸ *Rawlinson v. Stone* (1746), 3 Wils. 1 Ex. Ch.

indorsement of one is probably sufficient to transfer the property Death. in the bill.

Art. 100. A bill may be seized in execution by Execution. the sheriff under a writ of *fieri facias*.¹

Explanation.—Payment to the sheriff of a bill so seized is valid, and, if the judgment-creditor give security, an action may be brought on the bill in the name of the sheriff.²

NOTE.—The language of the Act is obscure and ungrammatical. Can the sheriff hand over to the creditor or sell a bill payable to bearer?³ The Act gives him no power to indorse a bill payable to order. Further, he is responsible to the judgment debtor for any surplus over the amount of the debt and costs. It would seem then that he must keep all bills and endeavour to collect them himself. As to execution against bills and notes under the County Court Acts, see 9 & 10 Vict. c. 95, ss. 96, 97.

Art. 101. If the holder of a bill, who is the bene- Bank- ficial owner of it, become bankrupt, or if a bill be ruptcy. made payable to a bankrupt for his own account, the title thereto vests in his trustee in bankruptcy.⁴

NOTE.—The title of the trustee relates back to the commencement of the bankruptcy. It is sometimes a difficult question to determine the exact time when a bankruptcy commences, but this is a question beyond the scope of a treatise on bills. When the holder has merely a lien on a bill his trustee stands exactly in his shoes, having the same rights and duties in regard to it.⁵ Where a bill is indorsed to an uncertificated bankrupt, it seems he may sue on it in his own name, unless his trustee interferes and objects.⁶

Explanation.—Subject to Art. 102, if the holder

¹ 1 & 2 Vict. c. 110, § 12. As to a cheque drawn by the Accountant-General of the Court of Chancery but not issued: Cf. *Watts v. Jefferies* (1851), 3 Mac. & G. 422; *Courtroy v. Vincent* (1852), 21 L. J. Ch. 291.

² 1 & 2 Vict. c. 110, § 12.

³ Cf. *Mutton v. Young* (1847), 4 C. B. at 373.

⁴ Cf. *Bankruptcy Act*, 1869. 32 & 33 Vict. c. 71, § 15, cl. 3; Cf. *Green v. Steer* (1841), 1 Q. B. 707.

⁵ Cf. *Ex parte Buchanan* (1812), 1 Rose, 280.

⁶ *Herbert v. Sayer* (1844), 5 Q. B. 965; approved *Jameson v. Brick and Stone Co.* (1873), 4 Q. B. D. 203 C. A.

Bank-
ruptcy.

of a bill is not the beneficial owner of it, the title thereto does not pass to his trustee in bankruptcy.¹

ILLUSTRATIONS.

1. C. indorses a bill to D., his agent, for some special purpose. D. becomes bankrupt. The title to the bill does not vest in D.'s trustee.²

2. D. by fraud induces C. to indorse a bill to him. D. becomes bankrupt. The title to the bill does not pass to D.'s trustee.³

Exception 1.—The bankrupt holder of a bill who negotiates it before the date of the order of adjudication can give a good title to a person who takes it in good faith for value, and without notice that such holder has committed an act of bankruptcy available for adjudication.⁴

NOTE.—As to what constitutes such notice, see *Ex p. Gilbey*.⁵

Exception 2.—Payment of a bill to a bankrupt holder is valid if made before the date of the order of adjudication in good faith, and without notice that he has committed an act of bankruptcy available for adjudication.⁶

Exception 3.—An accommodation bill given for the accommodation of the bankrupt (probably) does not pass to the trustee in bankruptcy.

ILLUSTRATIONS.

A. draws a bill on B. payable to his own order. B. accepts it to accommodate A. A. is adjudicated bankrupt. He subsequently

¹ *Bankruptcy Act*, 1869, § 15, cl. 1; Cf. *Harrison v. Walker* (1792), Peake Ad. Cas. 150.

² *Ex parte Armistead* (1828), 2 G. & J. 371; Cf. *Belcher v. Campbell* (1845), 8 Q. B. at 11. See e.g. *Thompson v. Giles* (1824), 2 B. & C. 422, bill entered "short" by banker.

³ *Harrison v. Walker* (1792), Peake Ad. Cas. 150.

⁴ *Bankruptcy Act*, 1869, §§ 94—95.

⁵ *Ex parte Gilbey* (1878), 8 Ch. D. 248, C. A.

⁶ *Bankruptcy Act*, 1869, ss. 94, 95.

indorses the bill to C., who gives value. The indorsement is valid. Bankruptcy. C. can sue B.¹

NOTE.—The terms of the present Act are very wide, see § 15, cl. 2, but the cases quoted probably still hold good.

Art. 102. If the holder of a bill, who is not the beneficial owner of it, become bankrupt, the title thereto passes to his trustee in bankruptcy, as being in his reputed ownership, provided—(a) that such holder be a trader; (b) that the bill constitutes “a debt due to him in the course of his trade or business;” (c) that he held it at the commencement of the bankruptcy with the consent and permission of the true owner.²

NOTE.—The provisions of the present Act, quoted above, are new, and no case on a bill has as yet arisen under them. It seems that a current bill would constitute a “debt due” within the meaning of the Act.³

Transfer by Assignment.

Art. 103. A bill may be transferred by assignment or sale, subject to the same conditions that would be requisite in the case of an ordinary chose in action. Assignment or sale.

ILLUSTRATIONS.

C. is the holder of a note payable to his order. He may transfer his title to D. by a separate writing assigning the note to D.;⁴ or by a voluntary deed constituting a declaration of trust in favour of D.;⁵ or by a written contract of sale.⁶

¹ *Wallace v. Hardacre* (1807), 1 Camp. 45; *Willis v. Freeman* (1810), 12 East, 656.

² 32 & 33 Vict. c. 71, § 15, cl. 5.

³ *Ex parte Kemp* (1874), 9 L. R. Ch. at 388, Mellish, L. J.; as to the previous law, Cf. *Hornblower v. Proud* (1819), 2 B. & Ald. 327; *Thompson v. Giles* (1824), 2 B. & C. 422.

⁴ *Re Barrington* (1804), 2 Scho. & Lef. 112.

⁵ *Richardson v. Richardson* (1867), 3 L. R. Eq. 636; Cf. *Byles*, p. 148 n.

⁶ *Sheldon v. Parker* (1874), 3 Hun. New York R. 498.

Assign-
ment or
sale.

NOTE.—A bill is a chattel, therefore it may be sold as a chattel. A bill is a chose in action; therefore it may be assigned as a chose in action. It is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment according to the general law, *e.g.*, C., the holder of a bill payable to bearer, assigns by deed certain property, including the bill, to D. C. no longer has any property in the bill, but he holds it, and if he transfers it by delivery to E., who takes it for value and without notice, E.'s title overrides D.'s.¹ Query, if a non-negotiable note can be assigned, there being an intention manifest on the instrument that it shall not be transferable.²

Bills to
order
transferred
without
indorse-
ment.

Art. 104. If the holder of a bill payable to order transfers it for value without indorsing it, the transaction operates as an equitable assignment of the bill.³

The transferee also acquires the right to compel indorsement.⁴

ILLUSTRATIONS.

1. C. the holder of a bill payable to order transfers it to D. for value without indorsing it. D. cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E.⁵

2. A. draws a bill on B. payable to his own order. B. accepts. A. discounts the bill with C., but by mistake or fraud omits to indorse it. C. indorses the bill in blank in A.'s name, and sues B. C. cannot recover; he had no right to indorse the bill.⁶

3. C. the holder of a bill payable to order transfers it for value to D. without indorsing it. If C. becomes bankrupt, the Court will compel his trustee in bankruptcy to indorse the bill.⁷ If C. dies, the Court will compel his executor or administrator to indorse.⁸

¹ Cf. *Sheldon v. Parker* (1870), 3 Hun. R. 498; *Aulton v. Atkins* (1856), 18 C. B. 249.

² Cf. *Brice v. Bannister* (1878), 3 Q. B. D. at 580, 581, per Brett, L. J.

³ *Whistler v. Forster* (1863), 14 C. B. N. S. at 258, Willes, J.; *Ex parte Pike* (1879), 40 L. T. N. S. 529.

⁴ *Harrop v. Fisher* (1861), 10 C. B. N. S. at 203, Byles, J.

⁵ *Harrop v. Fisher* (1861), 10 C. B. N. S. at 203, Byles, J.; and *Cunliffe v. Whitehead* (1837), 3 Bing. N. C. at 830.

⁶ *Harrop v. Fisher* (1861), 10 C. B. N. S. 196.

⁷ *Ex parte Mowbray* (1820), 1 Jac. & W. 428. Indorsement should negative personal liability: Cf. Art. 76. Indorsement by bankrupt is, it seems, equally good: *Ex parte Rhodes* (1837), 3 Mont. & Avr. 217.

⁸ Cf. *Watkins v. Maule* (1820), 2 Jac. & W. 237.

4. C., the holder of a bill for 1000*l.* payable to his order, deposits it with D. as security for a debt of 300*l.* C. becomes bankrupt. The Court will order C.'s trustee to indorse the bill to D. upon terms.¹ Bills to order transferred without indorsement.

Explanation.—When indorsement is subsequently obtained, the transfer takes effect as a negotiation² from the time when the indorsement is given.

ILLUSTRATIONS.

1. A. draws a bill on B. payable to C. or order. A. is induced to do so by C.'s fraud. C. transfers the bill to D. for value, but does not indorse it. D. subsequently receives notice of the fraud practised on A. After this he obtains C.'s indorsement. D. cannot recover from A.—he has no better title than C. *Aliter* if he had obtained C.'s indorsement before he had notice of the fraud.³

2. B. makes a note payable to C. or order. C. transfers it to D. for value without indorsing it. After the note is overdue, D. obtains C.'s indorsement. D. holds the note subject to all equities between B. and C.⁴

Art. 105. If the holder of a bill make delivery of it by way of gift in contemplation of death and die, this is a valid *donatio mortis causâ*.⁵

ILLUSTRATIONS.

1. C. the holder of a note payable to bearer, hands it to D. in contemplation of death. C. dies. The property in the note passes to D.⁶

2. C., the holder of a bill payable to his order, gives it to D. in contemplation of death and dies. The title to the note passes to D.⁶

¹ *Ex parte Price* (1844), 3 Mon. D. D. 586; but cf. *Ex parte Brown* (1824), 1 Gl. & J. 407, where a different order was made.

² Art. 106 as to meaning of negotiation.

³ *Whistler v. Forster* (1863), 14 C. B. N. S. 248; *Lancaster Bank v. Taylor* (1869), 1 Amer. R. 71.

⁴ *Clark v. Whitaker* (1871), 9 Amer. R. 286.

⁵ *Miller v. Miller* (1735), 3 P. Wms. 356.

⁶ *Veal v. Veal* (1859), 27 Beav. 303; *Austin v. Mcad* (1880), 15 Ch. D. 651.

*Donatio
mortis
causa.*

3. B. makes a note payable to C., and hands it to him as a gift in contemplation of death. B. dies. C. (perhaps) is not entitled to receive the amount out of B.'s estate.¹

NOTE.—It is clear that the gift of a bill or note does not create a debt as against the donor, cf. Art. 91; but is this the principle of a *donatio mortis causa*? The law as to the gift of bills and notes made by the donor requires re-consideration.² The recent cases have arisen on cheques where the peculiar relations of banker and customer complicate the matter, see Art. 262. Query, in illustration 2, must D. sue in the bill in the name of C.'s executor, or can he compel C.'s executor to indorse the bill to him as he could if he had given value? see Art. 104.

Transfer by Negotiation.

Negotia-
tion de-
fined.

Art. 106. "Negotiation" means the transfer of a bill in the form and manner prescribed by the law merchant with the incidents and privileges annexed thereby, *i.e.*—

- (1.) The transferee can sue all parties to the instrument in his own name.
- (2.) The consideration for the transfer is *prima facie* presumed.
- (3.) The transferor can under certain conditions give a good title, although he has none himself.
- (4.) The transferee can further negotiate the bill with the like privileges and incidents.

NOTE.—See rights of the holder, Arts. 136 to 145. Cf. Indian Draft Code, Art. 7. A bill is "negotiated when the holder transfers it to another person with the effect of constituting that other person the holder." See the negotiation of bills and notes distinguished from the sale of goods by Holroyd, J.,³ the assignment

¹ *Tate v. Hilbert* (1793), 4 Bro. C. C. 286; *Holliday v. Atkinson* (1826), 5 B. & C. at 503; but see the note to Art. 91.

² Cf. *Williams on Executors*, 7 Ed. 778—780.

³ *Wookey v. Pole* (1820), 4 B. & Ald. at 10 (comparing them to money).

of a chose in action by Willes, J.,¹ the transfer of shares in a Negotia-
company by Byles, J.,² and the transfer of an assignable Scotch tion de-
bond by Blackburn, J.³ fined.

Art. 107. Subject to Art. 124 a bill is negotiable ^{What bi}
which in legal effect is payable either to order or to ^{are ne-}gotiable
bearer.⁴

Explanation 1.—In order that a bill may be negotiable it must originally contain express words making it negotiable (Art. 8); but when a bill is in its origin negotiable, the absence in an indorsement of words implying power to transfer does not limit the negotiable effect of such indorsement.

ILLUSTRATIONS.

1. B. makes a note in the form "pay C.," omitting to add the words "or order." If C. indorse it to D., his indorsement will not operate as a negotiation. The note is not negotiable.⁵

2. A bill is drawn payable to C. or order. C. indorses it to D. thus, "Pay D.," omitting to add the words "or order." The bill is negotiable, and D. can negotiate it by indorsing it to E.⁶

Explanation 2.—A bill is payable to bearer which is expressed to be so payable, or which has been indorsed in blank.⁷

ILLUSTRATION.

C. is the holder of two bills, one drawn payable to C., or bearer, the other indorsed to him in blank. He transfers them to D. by merely handing them to him. This is a negotiation of the bills to D.

¹ *Whistler v. Forster* (1863), 14 C. B. N. S. at 258.

² *Swan v. N. B. Australasian Co.* (1863), 2 H. & C. at 184, 185.

³ *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 381.

⁴ Cf. *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382.

⁵ *Plimley v. Westley* (1835), 2 Bing. N. C. 249; *Whyte v. Heylman* (1859), 34 Pennsylvania R. 143. But cf. Art. 248, Excep. 3.

⁶ *Edie v. East India Co.* (1761), 2 Burr. 1216; *Leavitt v. Putnam* (1850), 3 New York R. 494; Cf. *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 357, Ex. Ch.

⁷ Cf. Art. 8 and Art. 116.

Modes of Negotiation.

Modes of
negotia-
tion.

Art. 108. There are two modes of negotiation : namely—(a) negotiation by delivery, and (b) negotiation by indorsement. The form of the instrument determines which mode is applicable.¹

Negotia-
tion of
bills pay-
able to
bearer.

Art. 109. A bill which in legal effect is payable to bearer is negotiated by delivery alone.²

NOTE.—As to what constitutes a delivery, cf. Art. 53—55.

Explanation.—A bill made or become payable to bearer may be subsequently indorsed. Such indorsement merely adds the indorser's guarantee, and may at any time be struck out without affecting the negotiability of the instrument.³

Negotia-
tion of bill
payable to
order.
Indorse-
ment
defined.

Art. 110. A bill, which in legal effect is payable to order, is negotiated by indorsement.⁴

Art. 111. "Indorsement" means a writing on a bill signed by the holder, ordering the amount to be paid to a person therein designated, or to his order or to bearer.

Explanation.—An indorsement must be completed by delivery ; and unless the contrary be expressed, the term "indorsement" means an indorsement completed by delivery.⁵

The holder who indorses a bill is called an "Indorser." Any person who makes title to a bill through an indorsement is called an "Indorsee."⁶

¹ Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606, H. L.

² Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606, and Art. 107.

³ *Fairclough v. Paria* (1850), 9 Exch. 690 at 695 ; Cf. *Keene v. Beard* (1860), 8 C. B. N. S. at 382.

⁴ Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606 ; *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382, and Art. 107.

⁵ *Lloyd v. Howard* (1850), 15 Q. B. 995 ; Cf. Art. 53—55.

⁶ Cf. *Barber v. Richards* (1851), 6 Exch. at 65.

NOTE.—This definition includes only indorsements proper, and Indorsement both a transfer and an executory contract. not what may be called quasi-indorsements. If a person who is not the holder of a bill backs it with his signature, he thereby incurs liabilities similar to those of an ordinary indorser, and his signature is termed an indorsement, though it in no way affects the transfer of the bill; Cf. Art. 217. In France this quasi-indorsement is termed “Aval” as opposed to “Endossement,” an indorsement proper.¹ The term “indorsement” used without qualification, includes indifferently an indorsement in blank and a special indorsement.²

Art. 112. Every indorsement consists *prima facie* of two distinct contracts—(a) the present transfer and negotiation of the bill; (b) the assumption of a future contingent liability on the part of the indorser.

Explanation.—The liability of the indorser may be limited, negatived, or enlarged without affecting the negotiation of the bill or note.

ILLUSTRATION.

C. indorses a bill to D. by way of gift or without recourse. The property in the bill passes to D., but C. is not liable as indorser. Art. 91.

NOTE.—For further illustrations see Arts. 64, 66, 68, 79, and cf. Art. 61. See also Arts. 120, 121, 123. It is important to distinguish the two factors in an indorsement, i.e., the transfer and the indorser's contract, for they are often governed by different considerations. The first resembles a contract of sale, the second a contract of guarantee. The first is an executed, the second an executory contract. By the first a *jus in rem* is transferred, by the second a *jus in personam* is created.

Art. 113. The mere signature of the holder constitutes an indorsement, but any form of words may be added from which the intention to indorse can be gathered.

¹ French Code, Art. 141—142; *Nouguier*, §§ 821—886.

² *Harmer v. Steele* (1849), 4 Exch. at 15.

³ Cf. *Denton v. Peters* (1870), 5 L. R. Q. B. 475; *Sigourney v. Clarke* (1846), 17 Connecticut 519; *Castrique v. Buttigieg* (1855), 10 Moore, P.C. at 108.

⁴ *Pinkney v. Hall* (1690), 1 Ld. Raym. 175; German Exchange Law, Art. 12.

ILLUSTRATIONS.

Form of
indorse-
ment.

1. C., the holder of a bill signs it, and writes thereon, "I hereby assign this draft and all benefit of the money secured thereby to D." This is an indorsement by C.¹

2. C., the holder of a note signs it, and writes thereon, "I bequeath—Pay the within to D., or his order, at my death," and gives it to D. This is not an indorsement, but an attempted testamentary gift, invalid under the Wills Act.²

NOTE.—Under the suspended Act, 17 Geo. 3, c. 30,³ the indorsement of a bill or note under 5*l.* required an attesting witness. French Code, Art. 137, requires an indorsement to be dated, to state the consideration, and the name of the indorsee, and to be to order. By Art. 138, if any of these requisites be wanting, it can only avail as a "procuratation."

Must be on
the bill.

Art. 114. The indorsement must be written on the bill itself.⁴

ILLUSTRATIONS.

1. An express promise in writing to indorse a bill is not an indorsement.⁵

2. The assignment of a note by a separate writing is not an indorsement.⁶

NOTE.—It has recently been held that where a bill broker who has discounted bills rediscounts them with his bankers, and instead of indorsing each bill gives a general guarantee, he can prove against the acceptor for the amount he has to pay under his guarantee and interest, if the bills are dishonoured.⁷

Explanation 1.—An indorsement on the face of a bill is valid.⁸

Explanation 2.—When there is no room on a bill for further indorsements, a slip of paper called an

¹ *Richards v. Franklin* (1840), 9 C. & P. at 225.

² *Mitchell v. Smith* (1864), 4 De G. J. & S. 422.

³ Now suspended by 39 & 40 Vict. c. 69.

⁴ Cf. *Gibson v. Minet* (1791), 1 H. Bl. at 606; German Exchange Law, Art. 11; *Parlessus*, No. 343.

⁵ Cf. *Harrop v. Fisher* (1861), 10 C. B. N. S. at 204.

⁶ *Re Barrington* (1804), 2 Scho. & Lef. 112; Cf. *Ex parte Harrison* (1789), 2 Brown C. C. 614.

⁷ *Ex parte Bishop* (1880), 15 Ch. D. 400, C. A.

⁸ *Young v. Glover* (1857), 3 Jur. N. S. Q. B. 637; *Ex parte Yates* (1858), 2 De G. & J. 191.

“Allonge” may be attached thereto. It becomes part of the bill, and indorsements may be written thereon.¹ Must be on the bill.

NOTE.—Some of the foreign codes contain minute provisions to prevent frauds, *e.g.*, that the first indorsement on the allonge must begin on the bill and end on the allonge; otherwise an allonge might be taken from one bill and stuck on to another; Cf. *Nouguier*, § 668.

Exception.—Indorsement on a “copy” in the case of a foreign Bill of Exchange.

NOTE.—As to “copies,” see *Nouguier*, §§ 208—211, and German Exchange Law, Art. 70—72. A “copy” of a bill must be distinguished from the parts of a set; Cf. Art. 25, *ante*.

Art. 115. A Partial indorsement, purporting to split the right of action on a bill is invalid as a negotiation, but may operate as an authority to receive payment of the amount thereby specified.² Partial indorsement

ILLUSTRATIONS.

1. C., the holder of a bill for 100*l.*, indorses it. “Pay 50*l.* to D. or order, and 50*l.* to E. or order.” This is invalid. Neither D. nor E. can sue or further indorse.³

2. C., the holder of a bill for 100*l.* indorses it. “Pay D. or order 30*l.*” This is invalid, unless C. also acknowledge the receipt of 70*l.*⁴

Art. 116. An Indorsement in Blank or General indorsement consists merely of the signature of the indorser without the expression of any further intention.⁵ Indorsement in blank.

¹ Cf. *Monmohunee v. Secretary of State* (1874), 13 Bengal L. R. 359; German Exchange Law, Art. 11.

² Cf. *Heilbutt v. Nevill* (1869), 4 L. R. C. P. at 358; *Conova v. Earl* (1868), 26 Iowa 169. See *Nouguier*, § 665.

³ *Id.*

⁴ *Hawkins v. Cardy* (1899), 1 Ld. Raym. 360.

⁵ Cf. German Exchange Law, Art. 12, and indorsement in blank distinguished from special indorsement; per Wilde, C. J., *Harmer v. Steele* (1849), 4 Exch. at 15; per Parke, B., *Roberts v. Tucker* (1851), 16 Q. B. at 579; and per Erle, C. J., *Law v. Parnell* (1859), 7 C. B. N. S. at 285.

ILLUSTRATION.

Indorse-
ment in
blank.

Bill payable to the order of John Smith. He signs on the back "John Smith." This act is interpreted by the law merchant as an indorsement in blank by John Smith, and operates as if he had written. 1. I hereby assign this bill to bearer. 2. I hereby undertake that if this bill be dishonoured, I, on receiving due notice thereof, will indemnify the bearer.

Under French Code, Arts. 137—138, an indorsement in blank merely operates as a "procuration," and not as a negotiation of the bill.¹ The indorsee is considered as the agent or "mandataire" of the indorser, and their relations are regulated accordingly. If, however, the indorsee has given value, he may convert the blank into a special indorsement.—*Nouguier*, §§ 747—760.

Explanation.—A bill indorsed in blank is payable to bearer, and may be negotiated by delivery alone.²

Special in-
dorsement.

Art. 117. A Special or Full indorsement designates the person to whom or to whose order the bill is thereby made payable.

ILLUSTRATIONS.

1. "Pay D. or order."
2. "Pay to D. & Co.," which in legal effect is "pay D. & Co., or order."³
3. "Pay to the order of the D. company," which in legal effect is "pay the D. company or order."⁴

Explanation.—A bill specially indorsed is payable to the indorsee therein designated, and can only be negotiated by his indorsement.⁵

Conver-
sion of
blank into
special in-
dorsement.

Art. 118. The holder of a bill indorsed in blank may convert such blank indorsement into a special indorsement by writing over the indorser's signature

¹ Cf. *Bradlaugh v. De Rin* (1870), 5 L. R. C. P. 473, Ex. Ch.; *Nouguier*, § 766.

² *Peacock v. Rhodes* (1781), 2 Dougl. at 636, per Lord Mansfield; *Swan v. North British Australasian Co.* (1863), 2 H. & C. at 184.

³ Art. 107.

⁴ *Soares v. Glyn* (1845), 8 Q. B. at 34, Ex. Ch.

⁵ *Hurrop v. Fisher* (1861), 30 L. J. C. P. 283.

a direction, ordering the amount of the bill to be paid to himself, or some other person.¹

Conversion of blank into special indorsement.

Explanation.—The holder who converts a blank into a special indorsement does not thereby incur the liabilities of an indorser.²

ILLUSTRATION.

D. is the holder of a bill indorsed in blank by C. D. writes over C.'s signature "Pay to E., or order," and hands the bill to E. This operates as a special indorsement from C. to E.

Art. 119. The negotiability of a bill which is originally payable to bearer, or which has been indorsed in blank, is not restrained by a subsequent special indorsement. It is still payable to bearer.³

Blank indorsement followed by special.

Explanation.—The special indorser is only liable on his indorsement to such parties as make title through it.⁴

ILLUSTRATION.

C., the payee of a bill, indorses it in blank and transfers it to D. D. specially indorses it to E., or order. E., without indorsing it, transfers it to F. Then F. is entitled as bearer to receive payment and to sue the drawer, acceptor, and C., but he cannot sue D. or E.⁵

NOTE.—Striking out Indorsements. The holder may at any time (e.g., at the trial after the plaintiff has finished his case)⁶ strike out any indorsement which is not necessary to his title. The indorser, whose indorsement is intentionally struck out, and all indorsers subsequent to him are discharged from their liabilities; *aliter* if the indorsement be struck out by mistake.⁷ *Qu.* if the present system of open pleading affects the necessity for striking out indorsements where the action is against the acceptor? The holder may, in some cases, make title through a person whose in-

¹ *Clerk v. Pigot* (1699), 12 Mod. 193; Cf. *Hirschfield v. Smith* (1866), 1 L. R. C. P. 340; German Exchange Law, Art. 13, *Nouguier*, § 747—748.

² *Vincent v. Horlock* (1808), 1 Camp. 441, and Art. 72.

³ *Walker v. Macdonald* (1848), 2 Exch. 527.

⁴ *Id.* and *Story*, § 207.

⁵ *Smith v. Clarke* (1794), Peake 225.

⁶ *Mayer v. Jadia* (1833), 1 M. & Rob. 247; *Byles*, 153.

⁷ *Wilkinson v. Johnson* (1824), 3 B. & C. 428, and Art. 240.

Blank indorsement followed by special. dorsement is struck out.¹ Indorsements for collection may be struck out by the owner of the bill,² and if the indorser of a bill takes it up or pays it when dishonoured, he may strike out his own and all subsequent indorsements, whether blank or special.³ Cf. Art. 239.

Qualified indorsement. Art. 120. A Qualified indorsement in express terms limits or negatives the ordinary liability of the indorser. It relates only to the indorser's liability, and does not otherwise affect the negotiation of a bill so indorsed.⁴

ILLUSTRATION.

C., the holder of a bill, indorses it to D. thus: "Pay D. or order without recourse to me," or "Pay D. or order sans recours,"⁵ or "Pay D. or order at his own risk."⁶ C. thereby passes his interest to D., but incurs no liability as an indorser.

NOTE.—It is held in America that an indorser "without recourse" is responsible to the same extent that a transferor by delivery is responsible, *e.g.*, where the bill is a forgery.⁷

Facultative indorsement. Art. 121. A Facultative indorsement in express terms waives the duties or enlarges the rights of the holder. It relates only to the indorser's liability, and does not otherwise affect the negotiation of a bill so indorsed.

ILLUSTRATION.

C., the holder of a bill, indorses it to D., adding the words "Notice of dishonour waived." No subsequent party is obliged to give notice of dishonour to C.⁸

NOTE.—Notice of dishonour may be waived verbally; *à fortiori*

¹ *Fairclough v. Pavia* (1854), 9 Exch. at 695; but cf. *Bartlett v. Benson* (1845), 14 M. & W. 733.

² *Dugan v. United States* (1818), 3 Wheat. 173; *Bank of Utica v. Smith* (1820), 18 Johns. 229, New York.

³ *Callow v. Lawrence* (1814), 3 M. & S. 95; German Exchange Law, Art. 55.

⁴ *Castrique v. Buttigieg* (1855), 10 Moore, P. C. 110—112, and 117; German Exchange Law, Art. 14. *Nouguier*, § 268—270.

⁵ *Goupy v. Harden* (1816), 7 Taunt. at 163.

⁶ *Rice v. Stearns* (1807), 3 Massachusetts R. 224.

⁷ *Dumont v. Williamson* (1867), reported in England 17 L. T. N. S. 71 and *Hannum v. Richardson* (1875), 21 Amer. R. 152. See Art. 226.

⁸ Cf. *Phipson v. Kelnor* (1818), 4 Camp. 285, and Arts. 163 cl. 4, 200 cl. 7.

then it may be waived in express terms. In America it has been held that an indorsement in the form given above affects subsequent indorsers,¹ and in France a similar construction has been put on the phrase "Retour sans frais" or "Retour sans protêt."² Facultative indorsement.

Art. 122. The indorser of a bill of exchange may insert in his indorsement a reference in case of need. Indorsement in need.
(Cf. Art. 7.)³

Art. 123. A "Conditional indorsement" transfers the bill to the indorsee, subject to the fulfilment of a condition therein specified. On the failure of the condition the title to the bill reverts to the indorser.⁴ Conditional indorsement.

ILLUSTRATION.

C., the holder of a bill, indorses it "Pay D. or order upon my name appearing in the *Gazette*, as ensign in any regiment, between the 1st and 64th, if within two months from this date." The bill is subsequently accepted. D. indorses it to E., who indorses it to F. At maturity F. presents the bill to the acceptor who pays it, although the condition has not been fulfilled. The payment is invalid, and C. can sue the acceptor on the bill and recover.⁵

NOTE.—The validity of a conditional indorsement is perhaps doubtful. *Robertson v. Kensington* (1811),⁶ seems to be the only decision on the point either in England or America. The judgment is not given in the report, so the *ratio decidendi* is not clear. Byles, Chitty, and Story merely say that a conditional indorsement is effectual, if the bill be subsequently accepted. In *Soares v. Glyn* (1845),⁷ the Exchequer Chamber seem to doubt whether a conditional indorsement could be allowed by the law merchant. No foreign code recognises a conditional indorsement. *Pothier* (No. 38) says that the indorser in his indorsement must conform to the same conditions as the drawer in his draft. It is continually laid down in the cases that the indorser is a new drawer, though not the drawer of a new bill. Apply this as a test. The drawer who is in direct relation with the drawee, may not draw a bill conditionally (Art. 10). Why should the indorser, who is a stranger

¹ *Daniell*, § 1090; *Parshley v. Heath* (1879), 31 Amer. R. 246. Waiver of demand and notice.

² *Nouguier*, § 259. German Exchange Law, Art. 42, is ambiguous.

³ Cf. *Leonard v. Wilson* (1834), 2 Cr. & M. 589; and Art. 184.

⁴ *Story*, § 217; *Thomson*, p. 185.

⁵ *Robertson v. Kensington* (1811), 4 Taunt. 30.

⁶ 8 Q. B. at 30; Cf., too, *Mitchell v. Smith* (1864), 4 De G. J. & S. 422.

Condi-
tional in-
dorsement.

to the drawee, be allowed to impose a condition which the drawer may not? Again, the payee of a bill must be certain (Art. 9); does not this apply to the indorsee? But under a conditional indorsement the title of the indorsee is defeasible. It is uncertain whether the indorser or the indorsee is the person entitled to receive payment. It would be convenient to give effect to a conditional indorsement as if it were merely restrictive. In that case the indorsee would be entitled to collect the bill irrespective of the fulfilment of the condition. If the condition were fulfilled he would hold the proceeds on his own account, if it were not he would hold them in trust for the indorser. Though the conditional transfer of a bill gives rise to difficulty, there seems to be no reason why the indorser's liability should not be conditional (Cf. Art. 112). Indian Draft Code, Art. 34, adopts this view, and provides that "an indorsement may be so made as only to charge the indorser upon the occurrence of a specified event which possibly may never happen." As to the conditional delivery of a bill absolute in form, see Art. 55.

Restrictive
indorse-
ment.

Art. 124. A "Restrictive indorsement" constitutes the indorsee the holder of the bill, but expresses that he is not the beneficial owner of it.

ILLUSTRATIONS.

1. "Pay D. or order for the use of X."¹
2. "Pray pay the money to my use."²
3. "Pay the contents to my servant for my use."³
4. "The within must be credited to D., value in account."⁴
5. "Pay the contents to my use," or "Pay the contents to the use of X," or "Carry this bill to the credit of X."⁵
6. "Pay D., or order for our use, value received in account."⁶
7. "Pay D., or order for the account of X."⁷
8. "Pay D., or order for my use."⁸
9. "Pay to the order of D. & Co., under provision for my note in favour of X."⁹

¹ *Evans v. Cramlington* (1687), 1 Show. 4; 2 Show. 509, Ex. Ch.

² *Snee v. Prescott* (1743), 1 Atk. at 249.

³ *Edie v. East India Co.* (1761), 2 Burr. at 1227, Wilmot, J.

⁴ *Anchor v. Bank of England* (1781), 2 Dougl. 637.

⁵ *Cf. Rice v. Stearns* (1807), 3 Mass. R. at 226.

⁶ *Wilson v. Holmes* (1809), 5 Mass. R. 543.

⁷ *Treuttel v. Barandon* (1817), 8 Taunt. 100; *Blaine v. Bourne* (1875), 23 Amer. R. 431.

⁸ *Sigourney v. Lloyd* (1828), 8 B. & C. 622; affirmed 5 Bing. 525, Ex. Ch.

⁹ *Wedlake v. Hurley* (1830), Lloyd and Welsby, 330.

10. "Pay D. & Co., or order for collection."¹

Restrictive
indorse-
ment.

NOTE.—A "restrictive indorsement" may, perhaps, be defined as "an indorsement which expresses that it is a mere authority to deal with the bill as directed, and not a transfer of the ownership thereof."

Explanation 1.—A statement in an indorsement that the value for it has been furnished by some person other than the indorsee does not make it restrictive.²

ILLUSTRATION.

Bill is indorsed "Pay D., or order, value in account with X." This is not restrictive. It is in effect a simple indorsement to D. or order.³

Explanation 2.—The mere omission to add words of negotiability to a special indorsement does not make it restrictive. Art. 107.

NOTE.—An indorsement in the form "Pay D. only" is probably restrictive, as being in terms a mere authority to D. to collect. If it appeared that D. was a holder for value, it is doubtful how far the restriction would be operative.⁴ Under German Exchange Law, Art. 15, if C. indorse a bill "pay D. only," the result is this: D. can still indorse the bill away, but C. is not liable on his indorsement. It is in effect an indorsement "without recourse," and not a restrictive indorsement.

Explanation 3.—A restrictive indorsement gives the indorsee no power to transfer his rights as indorsee unless it expressly authorizes him so to do.⁵

ILLUSTRATION.

Bill indorsed "Pay to D. for my account." D. cannot, by indors-

¹ *Sweeney v. Euster* (1863), 1 Wallace 166, Sup. Ct. U.S.; Cf. German Exchange Law, Art. 17.

² *Potts v. Reed* (1806), 6 Esp. 57; *Murrow v. Stuart* (1853), 8 Moore P. C. 267; Cf. Art. 10, Expl. 2.

³ *Buckley v. Jackson* (1868), 3 L. R. Ex. 135.

⁴ Cf. *Edie v. East India Co.* (1761), 2 Burr. 1225—1227, per Denison, J., and Wilmot, J.; *Rice v. Stearns* (1807), 3 Mass. at 225.

⁵ *Lloyd v. Sigourney* (1820), 5 Bing. at 532 Ex. Ch.; Cf. *Pothier*, No. 89; German Exchange Law, Art. 17.

Restrictive indorsement. ing it to E., authorise E. to collect it. *Aliter* if the indorsement ran "pay D. or order for my account."

Explanation 4.—A restrictive indorsement gives the indorsee the right to collect the bill and to sue any party thereto that his indorser could have sued.¹

NOTE.—It has never been attempted to make the payor responsible for the due application of the proceeds by the indorsee, and it is clear that he is not responsible. In the cases where the indorsee has sued the bill has been payable to him "or order." Can the omission of these words make any difference?²

Explanation 5.—The indorsee, under a restrictive indorsement, may transfer his rights as indorsee if he be authorized by the terms of the indorsement so to do. In such case, the second and every subsequent indorsee takes the bill with the same rights and subject to the same liabilities as the original restricted indorsee.³

Explanation 6.—When a bill is indorsed restrictively, the relation between the indorser and the indorsee is that of principal and agent.⁴

ILLUSTRATIONS.

1. C. indorses a bill "Pay D. or order for my use." D. indorses it to, and discounts it with, E. on his own account. E. collects it at maturity. C. can recover the amount of the bill from E.⁵

2. C. indorses a bill "Pay D. or order for the use of X." D. collects the bill at maturity. If he misappropriate the money, X. cannot sue him.⁶ The action must be brought by C.⁷

¹ *Evans v. Cramlington* (1887), 2 Show. 509, Ex. Ch.; *Wilson v. Holmes* (1809), 5 Mass. R. 543. Cf. German Exchange Law, Art. 17.

² Cf. *Dehers v. Harriot* (1691), 1 Show. 163, when the indorser sued.

³ *Treuttel v. Barandon* (1817), 8 Taunt. 100; *Lloyd v. Sigourney* (1829), 5 Bing. at 531; *Sweeney v. Easter* (1863), 1 Wallace R. 166, Sup. Ct. U.S.; German Exchange Law, Art. 17.

⁴ Cf. *Dehers v. Harriot* (1691), 1 Show. 163; *Potts v. Reed* (1806), 6 Esp. at 59; *Rice v. Stearns* (1807), 3 Mass. at 225; *Blaine v. Bourne* (1875), 23 Amer. R. at 432; by analogy, *Maguire v. Dodd* (1859), 9 Ir. Ch. 452; *Pothier*, Nos. 23 and 89—90.

⁵ *Lloyd v. Sigourney* (1829), 5 Bing. 525, Ex. Ch.

⁶ *Wedlake v. Hurley* (1830), Lloyd and Welsby, 330.

⁷ Id. at 332, per Vaughan, B.

3. C. indorses a bill "Pay D. or order for account of X." D. is Restrictive indorsement. X's agent. D. indorses the bill to E. who collects it. X. can sue E. for the amount so received.¹

4. A. draws a bill on B, and indorses it to C. C. indorses it, "Pay D. or order for my use." The bill is dishonoured, and D. sues A. the drawer. If A. have any defence against C., he may set it up against D.²

NOTE.—The restricted indorsee is frequently termed a trustee, but he is only a trustee in the sense that an agent is a trustee.³ See the position of an agent, bailee, or other person acting in a fiduciary capacity compared with a trustee, by Jessel, M. R.⁴ German Exchange Law, Art. 17, deals with restrictive indorsements, and accords with English law as stated above. In France the mere omission of the statement of the value received makes an indorsement restrictive.⁵ The indorsee is then deemed to be the agent or "mandataire" of the indorser. *Pothier*, Nos. 23 and 88—90, has worked out the results with great clearness.

Who may negotiate a bill.

Art. 125. A bill must be negotiated by the *de facto* holder. The transfer of a bill by any other person does not operate as a negotiation of the instrument. *De facto holder must negotiate.*

Explanation.—"De facto holder" means the person in possession of a genuine bill, to whom it is payable as payee, indorser, or bearer, whether he be lawfully in possession thereof or not.

NOTE.—The term "holder" is used in the cases in different senses. It is generally used to denote the "lawful holder," and as such it is defined in Art. 3. It then includes—(1) the person to whom a bill is in terms payable, and whose title is good against all the world; (2) the person to whom a bill is in terms payable, and who, as

¹ *Treuttel v. Barandon* (1817), 8 Taunt. 100. If D. had not been X.'s agent, C. must have brought the action.

² *Wilson v. Holmes* (1809), 5 Mass. R. 543.

³ Cf. *Cook v. Lister* (1863), 13 C. B. N. S. at 597, Willes, J.

⁴ *Re Hallet's Estate* (1880), 13 Ch. D. 708—711 C. A.

⁵ Cf. French Code Art. 138; *Nouguier*, § 744.

De facto
holder
must ne-
gotiate.

against third parties, is entitled to enforce payment—though as between himself and his transferor, he is a mere agent or bailee with a defeasible title (*e.g.*, an indorsee for collection). But “holder” is also used to denote an unlawful holder, that is, the person to whom a bill is in terms payable, whose possession is unlawful, but who nevertheless can give—(a) a valid discharge to a person who pays it in good faith (see Art. 236), and (b) a good title to a person who takes it before maturity in good faith and for value (see Art. 137). An unlawful holder must be distinguished from the mere wrongful possessor: *e.g.*, a person holding under a forged indorsement, or a person who has stolen a bill payable to the order of another, who has no rights and can give none. When, then, a proposition is laid down which applies equally to lawful and unlawful holders, the term *de facto* holder is used to include both.

Bill to
bearer.

Art. 126. The *de facto* holder of a bill which is, in legal effect, payable to bearer,¹ is the person in possession of it.

ILLUSTRATIONS.

1. C., the payee of a bill, indorses it in blank and transmits it to D. for some special purpose (*e.g.*, discount or collection). As long as D. retains possession, D. and not C. is the *de facto* holder, and he alone can negotiate it.²

2. C. is the holder of a note payable to bearer. C. loses it and D. finds it. D. and not C. is the *de facto* holder, and he alone can negotiate it.

Who may
negotiate
bill to
order.

Art. 127. The *de facto* holder of a bill which is, in legal effect,³ payable to order, is the person in possession of it, and to whose order it is payable.

NOTE.—See in illustration, Arts. 103—104.

Explanation.—If the person to whose order a bill is meant to be payable is wrongly designated, or if his name is mis-spelt, he may negotiate the bill by indorsing it as described.⁴

¹ Art. 107.

² *Marston v. Allen* (1841), 8 M. & W. at 504.

³ See Art. 107.

⁴ *Williamson v. Johnson* (1823), 1 B. & C. at 149, Holroyd, J.; *Schultz v. Astley* (1836), 2 Bing. N. C. at 553, Tindal, C. J.

ILLUSTRATION.

A bill is indorsed to J. Smythe. The man's real name is T. Who may Smith. He can validly negotiate the bill by indorsing it as J. Smythe.¹ negotiate
bill to
order.

NOTE.—The usual and proper course is for the holder to sign first the name as described or spelt in the bill, and then to put underneath his proper signature—*e.g.*, in the case given the indorsement would be signed,

J. Smythe,
T. Smith.

If a person trades under an assumed name, can he validly negotiate a bill payable to him under his trade name by indorsing it in his individual name, or *vice versa*?—*e.g.*, John Smith trades as "Brown & Co." A bill is drawn payable to the order of "Brown and Co." He indorses it as John Smith. Is the presentment for payment of this bill by the indorsee a due presentment? In *Massachusetts* it seems it is.² The point was raised in *Walker v. Macdonald* (1848),³ but the decision proceeded on the ground that there was a prior indorsement in blank, and therefore the bill was payable to bearer.

Exception.—When the title to a bill payable to order is transmitted by act of law, and the person to whom the title is transmitted obtains possession of the bill, he becomes the *de facto* holder.

NOTE.—See transmission by marriage (Art. 98), death (Art. 99), execution (Art. 100), bankruptcy (Art. 101), reputed ownership (Art. 102). See also dissolution of partnership (Art. 80). In America another exception is admitted in the case of corporations. Thus a bill payable to the order of the cashier or other officer of a bank is deemed to be payable to the bank; therefore, any person who can indorse for the bank can negotiate such a bill—*e.g.*, C. is the cashier of the "X. Bank," and D. is the president. A bill bought by the bank is indorsed "pay to the order of C., cashier." The "X. Bank" can sue on the bill in the corporate name, and D. the President can validly indorse it away without a previous indorsement by C.⁴ The expediency of this exception is doubtful.

¹ *Supra*, and Cf. *Willis v. Barret* (1816), 2 Stark. 29. Cf. Art. 9.

² *Bryant v. Eastman* (1851), 61 Mass. 111.

³ 2 Exch. 527.

⁴ *Waterchiet Bank v. White*, 1 Denio, 609; *First Nat. Bank v. Hall* (1871), 44 New York R. 395.

Several
payees or
indorsees.

Art. 128. Where a bill is payable to the order of two or more persons who are not partners, all must indorse.

Explanation.—One may indorse on behalf of the rest if he have authority so to do.¹

ILLUSTRATIONS.

1. B. accepts a bill payable to the "order of C. and D." D. alone indorses it to E. This is insufficient. E. cannot sue B.²

2. Bill payable to "the order of C. and D." C., by D.'s authority, indorses it to E. "for self and D." This is sufficient.

3. Bill payable to "C. and D. or the order of either." C. alone indorses it to E. This is sufficient.³

To whom a bill may be negotiated.

Certainty
as to in-
dorsee.

Art. 129. When a bill is specially indorsed, the indorsee must (probably) be designated with the same certainty that is requisite in the case of an original payee.⁴

NOTE.—Art. 123 creates the doubt. See the question there discussed. As to payee, see Art. 9.

Re-trans-
fer and re-
issue.

Art. 130. A bill may be negotiated to any party thereto—*i.e.*, drawer, drawee, acceptor, or prior indorser,—and such party, subject to Art. 238, may re-issue and further negotiate it.⁵

ILLUSTRATIONS.

1. C. is the holder of a bill accepted by B. payable three months after date. C. can indorse the bill to B., the acceptor, and B., at any time before maturity, may re-issue and indorse it to D.⁶

¹ *Carrick v. Vickery* (1781), 2 Dougl. 652; and cf. *Heilbut v. Nevill* (1869), 4 L. R. C. P. at 356, 358, per Willes, J.

² *Id.*

³ Cf. *Watson v. Evans* (1863), 32 L. J. Ex. 137.

⁴ Cf. *Pothier*, No. 38; *Soares v. Glyn* (1845), 8 Q. B. at 30, Ex. Ch.; *Murray v. East India Co.* (1821), 5 B. & Ad. 204.

⁵ Cf. German Exchange Law, Art. 10.

⁶ *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; Cf. *Witte v. Williams* (1876), 28 Amer. R. 294.

TRANSFER.

2. The drawer of a bill payable to his own order, indorses it to C. C. indorses it to D., who indorses it back to the drawer. The drawer can reissue the bill and indorse it to E.¹

Explanation.—When a bill is negotiated back to a party already liable thereon, he cannot sue the intermediate parties.²

ILLUSTRATIONS.

1. C., the holder of a bill, indorses it to D. D. indorses it to E., who indorses it back to C. C. cannot sue D. or E., for they in turn could sue him as a prior indorser.³

2. C., the holder of a bill, indorses it "without recourse" to D., who indorses it to E. E. indorses it back to C. C. can sue D. and E., for they have no claim against him as a prior indorser.⁴

3. B., for the accommodation of C., makes a note in his favour. C. indorses it to D., who discounts it with B. the maker. B. can sue C.⁵

NOTE.—The explanation given above is necessary in order to avoid circuity of action. See further Art. 234, Expl. 2.

Time of Negotiation.

Art. 131. A bill which is in form complete and negotiable, may be negotiated at any time until it is discharged.⁶

Explanation.—The character and incidents of the negotiability of a bill depend on the time at which it is negotiated.

NOTE.—As to the transfer of bill incomplete in point of form, see Art. 23; as to the issue of a bill by a person other than the maker, Art. 54.

¹ Cf. *Hubbard v. Jackson* (1827), 4 Bing. 390; and *Jones v. Broadhurst* (1850), 9 C. B. 173.

² Cf. *Wilders v. Stevens* (1846), 15 M. & W. 208 at 212; see per Alderson, B.

³ *Bishop v. Hayncard* (1791), 4 T. R. 470.

⁴ Cf. *Morris v. Walker* (1850), 15 Q. B. at 594.

⁵ *Morris v. Walker* (1850), 15 Q. B. 589; *Wilkinson v. Unwin* (1881), 29 W. R. Q. B. D. 458 C. A.

⁶ *Callow v. Lawrence* (1814), 3 M. & S. at 97, and Chapter VII.

Presump-
tion as to
time.

Art. 132. Unless the contrary appear on the instrument itself, a bill is *primâ facie* presumed to have been negotiated before maturity,¹ but apart from this general rule, there is no presumption as to the exact time of negotiation.²

NOTE.—Circumstances of strong suspicion short of direct evidence may rebut the *primâ facie* presumption and make it a question for the jury whether a bill was negotiated before or after maturity.³

When bill
deemed
overdue.

Art. 133. A bill which is payable at a future time is deemed to be overdue after the expiration of the last day of grace ;⁴ Cf. Art. 20.

It is uncertain when a bill of exchange payable on demand and not known to have been dishonoured is to be deemed overdue.

NOTE.—As to a note payable on demand, which is a continuing security, see Art. 282. As to a cheque, Art. 259. By German Exchange Law, Art. 16, a bill is not deemed to be overdue till the time for protesting it has elapsed. *Bill dishonoured by non-acceptance*.—If a person takes a bill before maturity, but with notice that acceptance has been refused, it is uncertain how far he takes it subject to equities which would attach to an overdue bill—*e. g.*, fraud, illegality of consideration, &c. According to *Crossley v. Ham* (1811),⁵ such a bill is on the same footing as an overdue bill ; but according to *Goodman v. Harvey* (1836),⁶ the holder takes it free from equities of which he has not notice. This latter case has frequently been approved in so far as it lays down the test of *bona fides*, but the exact point at issue has not been raised or discussed. In America, too, the decisions are conflicting. Cf. Art. 191 as to notice of dishonour.

Negotia-
tion of
overdue
bill.

Art. 134. The fact that a bill is overdue is equivalent to notice of all facts relating to it.⁷ In other

¹ *Lewis v. Parker* (1836), 4 A. & E. 238 ; Cf. Arts. 17 and 35.

² *Anderson v. Weston* (1840), 6 Bing. N. C. 296.

³ *Bounsall v. Harrison* (1836), 1 M. & W. 611.

⁴ Cf. *Leftley v. Mills* (1791), 4 T. R. 170.

⁵ 13 East, 498 ; Cf. dicta in *O'Keefe v. Dunn* (1816), 5 M. & S. 282, Ex. Ch.

⁶ 6 Nev. & Man. 372.

⁷ *Brown v. Davies* (1789), 3 T. R. at 82, Buller, J. ; *Cripps v. Davis* (1843), 12 M. & W. at 165, Parke, B.

respects an overdue bill which has not been dis- charged is negotiable as if current.¹

Negotia-
tion of
overdue
bill

Explanation 1.—If there be any fact relating to a bill notice of which would disentitle a holder who took the bill before maturity, the existence of such fact disentitles a holder who takes the bill after maturity irrespective of notice.² Any such disentitling fact is called an “Equity attaching to the bill.”³

ILLUSTRATIONS.

1. B., for an illegal consideration, makes a note payable to C. or order. C. indorses it, when overdue, to D. D. cannot sue B.⁴

2. A. draws a bill on B. payable to his own order. B. accepts the bill subject to a certain condition then verbally agreed on. A. indorses the bill, when overdue, to C. C. takes the bill, subject to the aforesaid condition, although he had no notice of it.⁵

Explanation 2.—If the holder who held the bill at its maturity had a good title, the fact that a previous holder had a defective title is immaterial.⁶ (Cf. Art. 87.)

ILLUSTRATION.

B., for an illegal consideration, accepts a bill drawn on him by A. A. indorses it before maturity to C., who takes it for value and without notice. C. indorses the bill, when overdue, to D. D. acquires a good title, for C. had a good title.⁷

Explanation 3.—The existence of a set-off or matter of counterclaim against the holder of a bill

¹ *Leavitt v. Putnam* (1850), 3 New York R. at 497.

² *O'Keefe v. Dunn* (1815), 6 Taunt. at 310 and 315; *Lloyd v. Howard* (1850), 15 Q. B. at 998.

³ Cf. *Deuters v. Townsend* (1864), 33 L. J. Q. B. at 304, Blackburn, J.

⁴ *Amory v. Mervether* (1824), 2 B. & C. 573.

⁵ *Holmes v. Kidd* (1858), 28 L. J. Ex. 112, Ex. Ch.

⁶ *Fairclough v. Pavia* (1854), 9 Exch. 690.

⁷ *Chalmers v. Lanion* (1808), 1 Camp. 383.

Negotia-
tion of
overdue
bill.

is not an equity which attaches to the instrument.¹

ILLUSTRATION.

C., the holder of a bill accepted by B., is indebted to B. for arrears of rent. If C. sues B., B. can set off the arrears of rent; but if C. indorses the bill when overdue to D. for value, B. cannot set off C.'s debt against D.

NOTE.—If in the instance given C. indorsed the bill to D. without value, D. would sue as a mere trustee for C.; therefore any defence available against C. would be available against D. also. This applies equally to current bills. Cf. Art. 141.

Explanation 4.—Mere absence of consideration is not an equity which attaches to a bill; but if there be an agreement, express or implied, not to negotiate an accommodation bill after maturity, the agreement constitutes an equity which attaches thereto.³

ILLUSTRATIONS.

1. B., to accommodate A., accepts a bill drawn on him by the latter, payable one month after date. A., after the bill is overdue, indorses it to C. for value. C. can sue B.⁴

2. B., being willing to accommodate A. with a three months' credit, accepts a bill drawn on him by A. payable three months after date, upon the terms that it is not to be left outstanding after that time. A. discounts the bill with C. when overdue. C. cannot recover against B.⁵

NOTE.—The rule laid down seems obvious. Notice that a bill is an accommodation bill is no defence against a holder for value before maturity, why then should the fact be a defence afterwards? The point, however, has only been settled after long controversy.

¹ *Oulds v. Harrison* (1854), 10 Exch. 572; *Ex parte Swan* (1868), 6 L. R. Eq. 344.

² *Sturtevant v. Ford* (1842), 4 M. & Gr. 101; *Ex parte Swan* (1868), 6 L. R. Eq. 344. Cf. Arts. 88 and 91.

³ *Parr v. Jewell* (1855), 16 C. B. 684, Ex. Ch.; *Carruthers v. West* (1847), 11 Q. B. 143, decided on demurrer, is not to the contrary, see *ratio decidendi*, per Wightman, J.

⁴ *Stein v. Yglesias* (1834), 1 C. M. & R. 565.

⁵ Cf. *Parr v. Jewell* (1855), 16 C. B. 684.

In New York, an opposite conclusion has been arrived at.¹ Possibly when an accommodation acceptance is given, there may be an implied agreement to negotiate it within a reasonable time, and that after the lapse of a reasonable time the holder would take it subject to this equity.²

Explanation 5.—The rights of a person who is not a party to the bill may constitute an equity attaching thereto if they arise out of transactions relating to the instrument.³

Negotiation of overdue bill.

ILLUSTRATION.

D., the manager of the "X. Bank," abstracts moneys belonging to the bank, and purchases therewith an overdue bill of exchange. This overdue bill he negotiates to E. The "X. Bank," and not E., is entitled to the bill, and if the acceptor becomes bankrupt, the "X. Bank" can prove against his estate.⁴

NOTE.—Payment and other discharges are sometimes spoken of as equities attaching to a bill, but this seems incorrect—they are rather grounds of nullity. That which purports to be a bill is no longer such; it is mere waste paper. Part payment, however, may be regarded as an equity which attaches to a bill.⁵ The position of a holder who takes a bill when overdue, is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two enquiries: 1. Has what ought to have been done really been done, *i.e.*, has the bill in fact been discharged? 2. If not, why not? Is there any equity attaching thereto? *i.e.*, was the title of the person who held it at maturity defective? If his title to the instrument was complete, it is immaterial that for some collateral reason, *e.g.*, a set-off, he could not have enforced the bill against some one or more of the parties liable thereon; Cf. Arts. 88, 230. In France, it seems, no distinction is drawn between overdue and current bills; *Nouguier*, §§ 679—680. By German Exchange Law, Art. 16, the indorser of an overdue bill acquires only the rights of his indorser; Cf. the Scotch Law, under 19 & 20 Vict. c. 60, § 16.

¹ *Chester v. Dorr* (1869), 41 N. Y. 279.

² See *Christian's Bankruptcy*, vol. 2, p. 430, and by way of analogy Art. 23.

³ *Ex parte Oriental Bank* (1870), 5 L. R. Ch. 358; Cf. *Lee v. Zagury* (1817), 8 Taunt. 114—by analogy *Re Gomersall* (1875), 1 L. R. Ch. D. 137.

⁴ *Id.*, see as to the limits, *Warren v. Haight* (1875), 65 New York R. 171.

⁵ *Graves v. Key* (1832), 3 B. & Ad. at 319; Cf. Art. 233.

After
action
brought.

Art. 135. The fact that a bill has been dishonoured and an action brought thereon does not restrain its negotiability.¹

ILLUSTRATION.

C., the holder of a dishonoured bill accepted by B., commences an action against him. Subsequently C. indorses the bill to D., who has notice of the action. D. can sue B. and recover.

NOTE.—If a bill be transferred, after action brought, to embarrass the defendant, his remedy is by application to the Court.² The Court, too, has full power over costs.

Rights acquired by Negotiation.

Holder's
rights.

Art. 136. The person to whom a bill is negotiated becomes the *de facto* holder (Art. 125) thereof. He thereby acquires the right to sue on the bill in his own name, and the power to further negotiate it.³

NOTE.—The power to negotiate must be distinguished from the right to negotiate. The right to negotiate is an incident of ownership. The power to negotiate is an incident of apparent ownership. Again, the right to sue must be distinguished from the right to recover, that depends on the further question whether the holder is a holder for value (Arts. 83 and 84), and in some cases whether he is also a holder for value without notice (Arts. 85 and 86).

De facto
holder can
give good
title.

Art. 137. The *de facto* holder of a genuine bill, regular on the face of it, who holds it wrongfully or who by parting with it is guilty of a fraud, can negotiate it with a good and complete title to a person who takes it before maturity as a *bonâ fide* holder for value without notice.⁴ Cf. Arts. 92 to 97.

¹ *Deuters v. Townsend* (1864), 33 L. J. Q. B. 301; Cf. *Woodward v. Pell* (1868), 4 L. R. Q. B. 55.

² *Id.* at 302, per Cockburn, C. J.

³ Cf. *Crouch v. Crédit Foncier* (1873), 8 L. R. Q. B. at 380—382.

⁴ *Marston v. Allen* (1841), 8 M. & W. at 504, see per Alderson, B., as to the principle.

Art. 138. An irregularity patent on a bill is equivalent to notice of any defect that may be behind it, and deprives the holder of the protection afforded to a *bonâ fide* holder for value without notice.¹ Patent irregularity.

ILLUSTRATIONS.

1. A., who is in possession of a blank acceptance signed by B., fills it up as a bill for 100*l.* in the presence of C., inserting his own name as drawer and C.'s name as payee. A. transfers the bill to C. for value. If it appears that A. had no authority to fill up the bill, or that his authority had been revoked, C. cannot recover against B.²

2. A. draws a bill on B. payable to his own order. B. accepts. It is afterwards arranged that the bill shall be cancelled. B. accordingly tears it in half. A. subsequently picks up the pieces, joins them together, and indorses the bill to C., who takes it for value and without notice. If the bill is so torn that it appears to have been divided for safe transmission by post, C. can recover; but if it was so torn as to shew an intention to cancel it, C. cannot recover.³

NOTE.—The rule as to overdue bills is probably a deduction from the same principle.⁴ See, too, Art. 74 as to signatures “per proc.” and Art. 250 as to alterations. See the distinction between latent and patent defects observed on by Lord Ellenborough and Bayley, J.⁵

Art. 139. No title can be made to a bill through the indorsement of a fictitious or non-existing person unless the party sued is estopped from setting up the fact. Cf. Art. 81. Fictitious payee and indorser.

¹ *Colson v. Arnot* (1874), 57 New York R. 253; Cf. *Angle v. N. W. Ins. Co.* (1875), 2 Otto at 342, Sup. Ct. U. S.; *Hogarth v. Latham* (1878), 3 Q. B. D. at 647, 649, C. A.

² *Hatch v. Searles* (1854), 2 Sm. & G. 147, (Stanway's case;) see, too, Conway's case affirmed, 24 L. J. Ch. 22, and *Aude v. Dixon* (1851), 6 Exch. 869.

³ *Ingham v. Primrose* (1859), 7 C. B. N. S. 82; Cf. *Scholcy v. Ramsbottom* (1810), 2 Camp. 485; *Redmayne v. Burton* (1860), 2 L. T. N. S. 324.

⁴ See *Brown v. Davies* (1789), 3 T. R. at 82, per Buller, J., and Art. 134.

⁵ *Dunn v. O'Keefe* (1816), 5 M. & S. at 286—289; Cf. *Ex parte Dixon* (1876), 4 L. R. Ch. D. at 136 (C. A.).

ILLUSTRATIONS.

Fictitious
payee and
indorser.

1. A. draws a bill on B. payable to C.'s order. C. is a fictitious person. B. accepts in ignorance of this fact. A. then indorses the bill in blank in C.'s name and discounts it with D., who has notice. D. cannot sue B.¹

2. A. draws a bill on B. payable to C.'s order. C. is a fictitious person. B. knowing this accepts. A. indorses the bill in blank in C.'s name and it is negotiated to D., a *bonâ fide* holder for value without notice. D. can sue B.²

3. B. is indebted to C. By arrangement between them a bill is drawn in the name of A., a deceased person, on B., payable to drawer's order. B. accepts, and the bill is indorsed in A.'s name to C. C. can sue B.³

4. A bill purporting to be drawn by A. on B., payable to C.'s order and indorsed by C. in blank is held by D. X. accepts it *suprà protest* for A.'s honour. D., who is a *bonâ fide* holder, sues X. It turns out that A.'s signature was forged, and that C. is a fictitious person. X. is estopped from setting up these facts.⁴

5. B., at the request of X., makes a note payable to C.'s order. C. is a fictitious person, but B. does not know this. X. indorses the note in C.'s name and it is negotiated to D., a *bonâ fide* holder for value without notice. D. can sue B.⁵

NOTE.—As to the effect of the drawee being a fictitious person, see Art. 2. In France the signature of a fictitious person on a bill constitutes a "supposition de nom," and renders the instrument invalid as a bill in the hands of all parties with notice.⁶ The signature of a fictitious person must be distinguished from (a) the signature of a real person who uses a fictitious name (Cf. Art.

¹ *Hunter v. Jeffery* (1797), Peake Ad. Ca. 146; Cf. *Bennet v. Farnell* (1807), 1 Camp. 129 and 180.

² *Gibson v. Minet* (1791), 1 H. Bl. 569, H. L.; Cf. *Gibson v. Hunter* (1794), 2 H. Bl. 288, H. L.

³ *Asphitel v. Bryan* (1865), 32 L. J. Q. B. 91; per Crompton, J., an estoppel on evidence. Affirmed Ex. Ch. 33 L. J. Q. B. 328; per cur. an estoppel by agreement.

⁴ *Phillips v. Im Thurn* (1865), 18 C. B. N. S. 694, on demurrer; see 1 L. R. C. P. 463, on evidence.

⁵ *Lane v. Kreckle* (1867), 22 Iowa, 477; Cf. *Cooper v. Meyer* (1830), 10 B. & C. 468; *Beeman v. Duck* (1843), 11 M. & W. 251; *Schultz v. Astley* (1836), 2 Bing. N. C. 544.

⁶ *Nouguier*, §§ 277 and 284—288; Cf. French Code, Art. 112; Italian Code, Art. 198.

71, Expl. 2), and (b) the false signature of a real person (Cf. Fictitious payee and indorser. Art. 81).

Art. 140. The drawer of an inland bill of exchange payable after date,¹ which is lost or has miscarried before maturity, is bound, on request, to give another bill of the same tenor, "the person to whom it is so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said bill so alleged to be lost or miscarried shall be found again."²

NOTE.—This remedy is very inadequate. See the provisions of the Foreign Codes, Art. 25 n. As to suing on a lost bill, see Art. 144.

Rights of Action and Proof.

Art. 141. The *de facto* holder of a bill is entitled to maintain an action thereon in his own name against all or any of the parties liable thereon,³ unless it is shewn that he holds the bill adversely to the true owner.⁴

Explanation 1.—It is immaterial that the holder never had any interest in the bill,⁵ or that he has parted with his interest therein.⁶

Explanation 2.—When the holder of a bill sues

¹ Sed vide *Rhodes v. Morse* (1850), 14 Jur. 800. Cheque.

² 9 & 10 Will. III., c. 17, § 3; *Rhodes v. Morse* (1850), 14 Jur. 800, cheque; Cf. *Walmsley v. Child* (1749), 1 Ves. Sr. at 335, and passim, *Thackray v. Blakett* (1812), 3 Camp. 164.

³ See R. S. C. Or. XVI. rule 5, and as to inferior courts 18 & 19 Vict. c. 67, s. 6.

⁴ *Jones v. Broadhurst* (1850), 9 C. B. 173; *Agra Bank v. Leighton* (1866), 2 L. R. Ex. at 63—65. See Art. 125, *de facto* holder defined.

⁵ *Law v. Parnell* (1859), 7 C. B. N. S. 282.

⁶ *Williams v. James* (1850), 15 Q. B. 498; *Poirier v. Morris* (1853), 2 E. & B. 89. Cf. *Megrath v. Gray* (1874), 9 L. R. C. P. 216.

De facto
holder's
right of
action.

as agent for another person, or when he sues wholly or in part for the benefit of another person, any defence or set-off available against that person is available *pro tanto* against the holder.¹ Cf. Art. 88.

ILLUSTRATIONS.

1. C., the holder of a bill, indorses it to D. for collection. D. can sue on it, but any defence available against C. is available against D.²

2. D. is the holder of a dishonoured bill for 100*l.* indorsed by C. C. pays D. 60*l.* D. sues the acceptor. As to 60*l.* D. sues as trustee for C., and only as to 40*l.* on his own account. As regards 60*l.* any set-off which the acceptor may have against C. is equally available against D.³

NOTE.—Where a person holds a bill as agent or trustee for another, he cannot use it as a set-off against a claim made against him individually.⁴

Action
on bill
payable
specially.

Art. 142. Subject to Arts. 98—102, when a bill is payable to a particular person or persons, or to his or their order, an action thereon must be brought in the name of such person or persons.⁵

ILLUSTRATIONS.

1. A bill is specially indorsed to the firm of “D. & Co.” An action on it must be brought in the name of the firm. The managing partner cannot sue on it in his own name.

2. A bill is specially indorsed to D., a partner in the firm of X. & Co., in payment of a debt due to the firm. An action on it must be brought in D.’s name, and not in the name of the firm.⁶

¹ *Lee v. Zagury* (1817), 8 Taunt. 114; *Royce v. Barnes* (1846), 52 Mass. chuss. 276; *Agra Bank v. Leighton* (1866), 2 L. R. Ex. 56; *Re Anglo-Greek Navigation Co.* (1869), 4 L. R. Ch. 174; *Pothier*, No. 41; Cf. *Beecherraise v. Lewis* (1872), 7 L. R. C. P. 372.

² *De La Chaumette v. Bank of England* (1829), 9 B. & C. 208, as explained by *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 164, Ex. Ch.

³ *Thornton v. Maynard* (1875), 10 L. R. C. P. 695.

⁴ *London & Bombay Bank v. Narraway* (1872), 15 L. R. Eq. 93.

⁵ *Attwood v. Rattenbury* (1822), 6 Moore at 583; *Pease v. Hirst* (1829), 10 B. & C. 122.

⁶ *Bawden v. Howell* (1841), 3 M. & Gr. 638.

NOTE.—In the case given in Illust. 1, the managing partner might indorse the bill in the firm's name to himself and then sue. Cf. Art. 119, n., as to striking out indorsements. Action on bill payable specially.

Art. 143. Subject to Art. 141, when a bill is payable to bearer an action thereon may be brought in the name of any person who has either the actual or the constructive possession thereof. Action on bill payable to bearer.

ILLUSTRATIONS.

1. C., the holder of a bill, indorses it in blank to D. to collect it for him. Either C. or D. may sue the acceptor.¹

2. A bill accepted by B. is indorsed in blank by C. D., E. and F. bring an action on the bill against B. They can recover, although there is no evidence to show that they are partners, or what the nature of their joint interest is.²

3. A bill is indorsed in blank to a firm. Any one of the partners may bring an action on it in his own name.³

4. A bill indorsed in blank is handed to the manager of a company in payment of a debt due to the company. The manager may sue on it in his own name.⁴

5. A bill indorsed in blank is given to D.'s attorney, who commences an action on it against the acceptor in D.'s name. D. knows nothing of the matter, but after the action has proceeded some way he is told of it, and then gives his consent. D. can maintain the action.⁵

6. D., the holder of a bill indorsed in blank, does not wish to sue on it in his own name. He accordingly asks E. to sue on it. E. consents. E. gets a copy of the bill and it is agreed that he shall have the original when wanted. E. commences an action against the acceptor, and after action brought he gets the bill. E. cannot

¹ *Clerk v. Pigot* (1699), 12 Mod. 193; Cf. *Stone v. Butt* (1834), 2 Cr. & M. 416.

² *Ord v. Portal* (1812), 3 Camp. 239; Cf. *Rordanz v. Leach* (1816), 1 Stark. 446; *Low v. Copestake* (1828), 3 C. & P. 300.

³ *Lindley*, 3 ed. p. 302; *Attwood v. Rattenbury* (1822), 6 Moore 579; *Wood v. Connop* (1843), 5 Q. B. 292, as to joint holders; *Conover v. Earl* (1868), 26 Iowa R. 168, as to holders in common.

⁴ *Law v. Parnell* (1859), 7 C. B. N. S. 282.

⁵ *Ancona v. Marks* (1862), 31 L. J. Ex. 163.

Action on bill payable to bearer. maintain this action, for at the time he began it he had neither the actual nor the constructive possession of the bill.¹

Explanation.—A constructive possession jointly with others is sufficient to entitle the possessor to sue alone.

ILLUSTRATION.

A note payable to bearer is handed to the solicitor of a loan society in payment of a debt due to the society. D., a member of the society, instructs the solicitor to commence an action on it in his (D.'s) name against the maker. D. can maintain this action.²

NOTE.—As to constructive possession, see Art. 53 n.

Action on lost bill.

Art. 144. In an action founded on a bill “the Court or a judge may order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the Court or judge, or a master, against the claims of any other person upon such negotiable instrument.”³ Cf. Art. 165.

Holder's right of proof.

Art. 145.—When a party to a bill becomes bankrupt the holder, who could have maintained an action against such party if he had remained solvent, can prove against his estate in bankruptcy.⁴

Explanation.—Any defence, set-off, or counter-claim available in an action is available against a proof.⁵

NOTE.—In one respect the right of proof is more extensive than the right of action. An action can only be brought to recover

¹ *Emmet v. Tottenham* (1853), 8 Exch. 884; Cf. *Olcott v. Rathbone* (1830), 5 Wend. 490, New York.

² *Jenkins v. Tongue* (1860), 29 L. J. Ex. 147.

³ 17 & 18 Vict. c. 125, § 87. Cf. *King v. Zimmerman* (1871), 6 L. R. C. P. 466, and see *Wright v. Maidstone* (1855), 24 L. J. Ch. 624.

⁴ Cf. 32 & 33 Vict. c. 71, § 31; Cf. *Re Charles* (1873), 8 L. R. Ch. at 537.

⁵ See e.g. *Rhode v. Proctor* (1825), 4 B. & C. 517, want of notice of dishonour; *Ex parte Mannors* (1812), 1 Rose, 68, want of a stamp; Cf. *Jones v. Gordon* (1877), 2 L. R. Ap. Ca. 627, H. L.

a debt which is due, but under Bankruptcy Act 1869, § 31, a Holder's future or contingent debt may be proved; therefore if the acceptor of a bill not yet due becomes bankrupt the holder may prove, and so might the drawer or an indorser¹—so, too, the holder of an accepted bill may prove if the drawer or an indorser becomes bankrupt.² But as regards amount, the right to prove is narrower than the right to sue. The amount for which a holder can prove is limited by rules peculiar to bankruptcy, such as the rules relating to double proof³ and creditors holding security.⁴ These it is beyond the scope of the present work to discuss.

¹ Cf. *Wood v. De Mattos* (1865), 1 L. R. Ex. 91 Ex. Ch.

² Cf. *Starey v. Barnes* (1806), 7 East, 435.

³ See e.g. *Re Douglas* (1872), 7 L. R. Ch. 490, foreign bankruptcy; approved *Banco de Portugal v. Waddell* (1880), 5 App. Cas. at 165.

⁴ See e.g. *Re Howe* (1871), 6 L. R. Ch. 838, conditional acceptance.

CHAPTER V.

DUTIES OF THE HOLDER.

Effect on
considera-
tion of
omission
of holder's
duties.

Art. 146. When a party to a bill is discharged from his liability thereon by reason of the holder's omission to perform his duties as to presentment for acceptance or payment, protest, or notice of dishonour, such party is also discharged from liability on the consideration for which the bill was given.¹

NOTE.—The holder's omission, without lawful excuse, to perform his duties with reference to a bill is commonly called "laches." As the Crown can do no wrong, so also it cannot be guilty of laches.

Presentment for Acceptance.

When
necessary
or op-
tional.

Art. 147. (1.) Where a bill of exchange is payable after sight presentment for acceptance is necessary in order to fix the maturity of the instrument.
Art. 150.

(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or (perhaps) where a bill is drawn payable at some place other than the place of business or residence of the drawee it must be presented for acceptance before it can be presented for payment.

¹ *Byles*, 12 ed. pp. 215 and 292, and Arts. 160, 190; Cf. *Crowe v. Clay* (1854), 9 Exch. 604.

(3.) In any other case presentment for acceptance is optional.¹ When necessary or optional.

NOTE.—In America it has been held that where a bill payable after date was drawn on B. payable at the X. Bank, it was sufficient to present the bill for payment at the X. Bank without making any demand on B.² But suppose a bill is drawn on B. who resides in Liverpool, "payable in London," must it not be presented for acceptance to B. before it could be treated as dishonoured by non-payment in London? This would be the case in France, *Nouguier*, § 1068. By German Exchange Law, Art. 24, when a bill is drawn payable at the house of a third person, the drawer may insert a stipulation requiring presentment for acceptance. In France it seems the drawer or indorser of any bill may insert such a stipulation, *Nouguier*, §§ 464—469. See also Netherlands Code, Arts. 117 and 176.

Where presentment is optional, the object of presenting is (1), to obtain the acceptance of the drawee and thereby secure his liability as a party to the bill; (2) to obtain an immediate right of recourse against antecedent parties in case the bill is dishonoured by non-acceptance. A bill in the form "Pay without acceptance" is valid.³

Art. 148. Due presentment for acceptance is a condition precedent to the exercise by the holder of the rights which arise on dishonour by non-acceptance. (Cf. Art. 157.) Due presentment for acceptance.

Explanation.—"Due presentment for acceptance" means presentment in accordance with Arts. 149 to 154.

NOTE.—Subject to Art. 150, Expl. 3, the question of due presentment is only material when acceptance cannot be obtained. If acceptance is obtained the informality of the presentment is immaterial. There is very little English authority on the subject, and it is clear that rules as to presentment for payment do not apply in their entirety to presentment for acceptance. Cf. Art. 155, n.

¹ *Ramchurn v. Radakissen* (1854), 9 Moore P. C. at 65, 66; *Thomson*, p. 276; German Exchange Law, Arts. 19 and 24.

² *Walker v. Stetson* (1869), 2 Amer. R. 405.

³ *R. v. Kinnear* (1838), 2 M. & R. 117.

By whom. Art. 149. Any person in possession of a bill of exchange may present it for acceptance.¹

NOTE.—The Court of Appeal in Dec. 1876, dissolved an injunction restraining the drawee from accepting a bill because the holder had obtained it by a fraud. Bills are constantly forwarded undorsed to an agent for him to procure acceptance. An agent must exercise due diligence in presenting for acceptance. He is liable to his principal for damage resulting from his negligence.²

Time for
presenting
bill after
sight.

Art. 150. The holder of a bill of exchange payable after sight is bound either to negotiate it away or to present it for acceptance within a reasonable time. If he omit to do so the drawer and prior indorsers are discharged.³

Explanation 1.—Reasonable time is a mixed question of law and fact.⁴

Explanation 2.—In determining what is a reasonable time regard is to be had to the nature of the bill, the usage of trade with respect to similar bills, and the circumstances of the particular case looking to the interests both of the holder and the drawer.⁵

ILLUSTRATIONS.

1. A. in Windsor draws a bill on B. in London, payable one month after sight. The holder keeps it four days before presenting it for acceptance. It is then dishonoured. This may not be an unnecessary delay.⁶

2. A. in London draws a bill on B. in Rio, payable sixty days

¹ *Nouguier*, § 462; German Exchange Law, Art. 18; *Thomson*, p. 282; Cf. *Morrison v. Buchanan* (1833), 6 C. & P. 18, and Art. 28 as to the parts of a set.

² As to date bills, *Pothier*, No. 128; *Nouguier*, § 462; *Allen v. Suydam* (1828), 20 Wend. 321, New York. As to sight bills, *Bank of Van Diemens Land v. Victoria Bank* (1871), 3 L. R. P. C. at 542. Cf. Art. 164, n.

³ *Mellish v. Raveдон* (1832), 9 Bing. 416; *Ramchurn v. Radakissen* (1854), 9 Moore P. C. 46; Cf. *Goupy v. Harden* (1816), 7 Taunt. at 163. Cf. Art. 146.

⁴ *Id.*

⁵ *Id.*; and *Wallace v. Agry* (1827), 4 Mason 336, Sup. Ct. U. S., Story, J.

⁶ *Fry v. Hill* (1817), 7 Taunt. 395; Cf. *Shute v. Robins* (1828), 2 C. & P. 80.

after sight. The payee holds it back for four months, during which time Rio bills are at a discount. He then negotiates it. This may not be an unreasonable delay.¹ Time for presenting bill after sight.

3. A. in Newfoundland draws a bill (*in a set*) on B. in London, payable ninety days after sight. The payee holds it back for two months and then forwards it for presentment. No reason for holding back is shown. This may be an unreasonable delay.²

4. A. in Calcutta draws a bill on B. in Hong Kong payable sixty days after sight. The holder retains it for five months, during which time China bills are at a discount. He then negotiates it. This may be an unreasonable delay.³

Explanation 3.—When there is unreasonable delay the drawer and prior indorsers are (probably) discharged, although the bill when presented is accepted.⁴

ILLUSTRATION.

A. draws a bill on B. payable to C. three months after sight. C. holds it back for an unreasonable time. He then presents it and it is accepted. Before it is due the acceptor fails. A. is probably discharged.

NOTE.—*Qu.* What is the liability of a person who retains a bill an unreasonable time and then negotiates it without indorsement? Again, does negotiation within a reasonable time, *toties quoties*, excuse presentment, or is there any limit? By German Exchange Law, Art. 19, when a bill payable after sight does not fix a time for presentment, it must be presented within two years of its date. By French Code, Art. 160, as amended by the law of May 3, 1862, bills payable after sight are divided into classes according to the places where they are drawn and payable, and definite limits of time for presentment are fixed, varying from three months to one year—*e.g.*, bill drawn in Paris on London must be presented for acceptance within three months. The effect of this conflict of laws has not been considered.

Art. 151.—A bill of exchange, payable otherwise Time for presenting other bills.

¹ *Mellish v. Rawdon* (1832), 9 Bing. 416.

² *Straker v. Graham* (1839), 4 M. & W. 721. Cf. Art. 28.

³ *Ramchurn Mullick v. Radakissen* (1854), 9 Moore P. C. 46; Cf. *Godfray v. Coulman* (1859), 13 Moore P. C. 11.

⁴ *Straker v. Graham* (1839), 4 M. & W. 721.

Time for
presenting
other bills. than at a fixed time after sight, may be presented for acceptance at any time before maturity.¹

NOTE.—In the case of a bill which is due or payable on demand, presentment for acceptance is merged in presentment for payment. When a bill is presented for payment, the drawee instead of paying it, often accepts it payable at his bankers. This is in effect a kind of payment by cheque,² which the holder perhaps might refuse to take. In New York it is held that if a bill payable after date be presented on the day it is due and dishonoured, it is immaterial whether it is treated as dishonoured by non-acceptance or non-payment.³ Considering the difference in the rules which govern the two kinds of presentment this might have important consequences. See also Art. 34.

Day and
hours.

Art. 152. Presentment for acceptance must (probably) be made on a business day, and at a reasonable hour.⁴

Explanation 1.—When the day on which a bill of exchange should be presented or received for acceptance is a bank holiday it is to be presented on the next business day.⁵

Explanation 2.—When the drawee is a trader reasonable hours mean the ordinary business hours of his trade.⁶

ILLUSTRATION.

Bill drawn on a banker is presented for acceptance after banking hours and the bank is found closed. The bill cannot be treated as dishonoured.

NOTE.—Probably if presentment was made on a non-business day, or at an unreasonable hour, and the drawee refused acceptance on some other ground, the bill might be treated as dishonoured.

To whom
and where.

Art. 153. Presentment for acceptance must be

¹ *O'Keefe v. Dunn* (1815), 6 Taunt. at 307; German Exchange Law, Art. 18; *Nouguier*, § 456.

² Cf. *Bishop v. Chitty* (1742), 2 Stra. 1195.

³ *Plato v. Reynolds* (1863), 27 New York R. 586.

⁴ *Chitty*, p. 199; *Byles*, p. 182. No decision. Cf. Art. 163, and *Startup v. Macdonald* (1843), 6 M. & Gr. at 624.

⁵ Bank Holidays Act, 1871, 34 & 35 Vict. c. 17, § 2.

⁶ Cf. *Nelson v. Fetteral* (1836), 7 Leigh at 194, and Art. 163.

made to the drawee personally, or to some person ^{To whom} who has authority to accept or refuse acceptance on ^{and where.} his behalf.¹

NOTE.—By Art. 176 of the Netherlands Code, the acceptance of a bill must be demanded from the drawee at his domicile, and not at the place where the bill has been made payable.

Explanation 1.—When a bill of exchange is drawn payable at the house or place of business of some person other than the drawee, presentment for acceptance at such house or place is not a presentment to the drawee.²

Explanation 2.—When the drawee is dead presentment must (perhaps) be made to his executor or administrator.³

NOTE.—The law on this point is not yet settled.

Art. 154.—The person who presents a bill of exchange for acceptance must deliver it up to the drawee if required so to do. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must re-deliver it accepted or un-accepted.⁴ Drawee may retain bill twenty-four hours.

Explanation 1. — In reckoning the twenty-four hours non-business days must be excluded.⁵

Explanation 2.—If after the expiration of the twenty-four hours the drawee refuses to re-deliver the bill it must be treated as dishonoured in order

¹ *Cheek v. Roper* (1804), 5 Esp. 175 ; *Byles*, p. 182.

² *Chitty*, p. 196 ; Cf. Art. 155, n.

³ Cf. *Smith v. N. S. Wales Bank* (1872), 8 Moore, P. C. N. S. at 461, 462, per Mellish, L.J. *Daniel*, § 458. French Code, Art. 163.

⁴ *Bank of Van Diemens Land v. Victoria Bank* (1871), 3 L. R. P. C. at 542, 543 ; *Story*, § 237 ; French Code, Art. 125.

⁵ *Id.* see at 546, 547, as to the effect of a short day—*e.g.*, Saturday.

Drawee
may retain
bill
twenty-
four hours.

Present-
ment for
accept-
ance, when
excused.

to preserve the holder's right of recourse against antecedent parties.¹

Art. 155.—Presentment for acceptance is excused, and a bill of exchange may be treated as dishonoured by non-acceptance :—

1. When the drawee is discovered to be a fictitious person² or (perhaps) a person not having capacity to contract.³

2. (Probably) when, after the exercise of reasonable diligence, presentment cannot be effected.⁴

Explanation.—The fact that a holder has reason to believe that the bill on presentation will be dishonoured does not dispense with the necessity for presentment.⁵

NOTE.—In *Anon.* (1700), 1 Ld. Raym. 743, where the drawee had absconded, the bill was merely protested for better security, and at maturity it was again protested for non-payment. This seems to be the only case in point, but it can hardly be a binding precedent now that it is settled that a right of action at once arises on dishonour by non-acceptance (Art. 157). At the same time it is clear that considerations applicable to presentment for payment do not apply in their entirety to presentment for acceptance. Speaking generally, presentment for acceptance must be personal, while presentment for payment must be local. A bill must be presented for payment where the money is. Any one can hand then over the money (Cf. Art. 167). A bill must be presented for acceptance to the drawee himself, for he has to write the acceptance; but the place where it is presented to him is comparatively immaterial, for all he has to do is to take the bill (Cf. Art. 154). Again (except in the case of demand drafts) the day for payment is a fixed day, but the drawee cannot tell on what day it may suit

¹ *Bank of Van Diemens Land v. Victoria Bank* (1871); Cf. *Ingram v. Forster* (1805), 2 Smith 242; see, too, German Exchange Law, Art. 20.

² Cf. *Smith v. Bellamy* (1817), 2 Stark. 223.

³ *Byles*, 12 ed. p. 187; no decision in point.

⁴ *Byles*, 12 ed., p. 183; *Chitty*, p. 199; *Brooks' Notary*, 4 ed., p. 79; no decision in point. Cf. *Smith v. N. S. Wales Bank* (1872), 1 Moore, P. C. N. S. at 461—463.

⁵ *Robinson v. Ames* (1822), 20 John. at 149, New York; *Ex parte Tondeur* (1867), 5 L. R. Eq. at 165. Cf. Art. 168.

the holder to present a bill for acceptance. If the drawee be a Presentment for acceptance at his place of business, but suppose the drawee is not there, what further steps must be taken? What diligence must be used before the bill can be treated as dishonoured? The immediate right of action which arises on non-acceptance is an exceptional right.¹ How far ought it to be favoured? It is one thing to excuse delay where presentment is necessary, another to treat a bill as dishonoured where presentment is optional.

Art. 156. A bill of exchange is "dishonoured by non-acceptance" (1) when it is duly presented for acceptance, and an acceptance in due form is refused or cannot be obtained, or (2) when presentment for acceptance is excused, and the bill is not accepted.

Art. 157. Subject to Art. 48, when a bill of exchange is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, provided that the proper proceedings on dishonour be taken.²

ILLUSTRATION.

A. draws a bill on B. payable to C. three months after date. Two days after it is drawn C. presents the bill to B. for acceptance. B. dishonours it. C. can at once sue A. on the bill. He need not wait till it matures.

NOTE.—This rule seems peculiar to English and American law. On the continent the holder can only protest the bill for non-acceptance and demand security from the drawer and indorsers. When the bill matures he must again present it for payment. His right of action arises on non-payment.³ The effect of this conflict of laws has not been judicially considered.

Explanation.—The holder of a bill of exchange which has been dishonoured by non-acceptance may

¹ Cf. Art. 157, n., and *Dunn v. O'Keefe* (1816), 5 M. & S. at 289, Abbot, C. J.

² *Whitehead v. Walker* (1842), 9 M. & W. at 516; *Watson v. Tarpley* (1855), 20 How. at 519, Sup. Ct., U. S.

³ French Code, Arts. 119, 120; German Exchange Law, Arts. 25—28 Italian Code, Arts. 206, 207.

Consequence of dishonour by non-acceptance. re-present it to the drawee for acceptance or payment, though he is not bound so to do.¹

NOTE.—Suppose a bill is presented for acceptance and dishonoured. The holder gives no notice of dishonour, but re-presents the bill a few days after and gets it accepted. It is dishonoured by non-payment. Are the drawer and indorsers discharged as regards such holder? A subsequent holder without notice would not be affected (Art. 191). The proper course is to give notice of dishonour, and at the same time to intimate an intention to re-present.

Duties as to Qualified Acceptances.

Holder's right to general acceptance. Art. 158. The holder of a bill of exchange is entitled to have it accepted generally. If a general acceptance be refused and a qualified acceptance is offered or given, the bill may be treated as dishonoured.²

NOTE.—As to general and qualified acceptances, see Arts. 38, 39. By German Exchange Law, Art. 20, if the acceptor refuse to date his acceptance on a bill payable after sight it may be treated as dishonoured.

Notice of qualified acceptance. Art. 159. If the holder of a bill of exchange elect to take a qualified acceptance, he must give notice of the qualification to antecedent parties.³

NOTE.—As to the effect of the notice when given, see Art. 40. A foreign bill should be protested as to the variation. The notice given must be notice of qualification, not notice of dishonour. If the holder give notice of dishonour, he cannot take advantage of the acceptance.⁴

¹ *Hickling v. Hardy* (1817), 7 Taunt. 312; Art. 34.

² *Boehm v. Garcias* (1808), 1 Camp. 425; *Gannon v. Schmall* (1814), 5 Taunt. at 353; Cf. French Code, Art. 124; German Exchange Law, Art. 22.

³ Cf. *Sebay v. Abithol* (1816), 4 M. & S. at 466, Bayley, J.; *Whitehead v. Walker* (1842), 9 M. & W. at 509.

⁴ Cf. *Bentinck v. Dorien* (1805), 6 East, 199.

Presentment for Payment to charge Drawer and Indorsers.

Art. 160. Due presentment for payment, unless ^{Necessity}excused,¹ is a condition precedent to the liability of ^{for pre-}the drawer or indorser of a bill of exchange.² The omission by the holder to make due presentment deprives him of any right of action on the consideration, as well as of his right of recourse on the instrument.³

Explanation. — Due presentment for payment means presentment in accordance with Arts. 161 to 167.

NOTE.—The rules applicable to the drawer or indorser of a bill apply equally to the indorser of a note⁴ or cheque, but they do not apply to the maker of a note, who is sometimes called the drawer (Art. 286); and they are modified as to time as regards the drawer of a cheque (Art. 258). See Art. 155, n., presentment for payment and presentment for acceptance contrasted. According to French Code, Art. 161, a bill must be presented for payment on the day it falls due, but it seems no penalty follows the omission to present, provided the bill be duly protested on the following day; *Nouguier*, § 1076. Practically, then, protest is substituted for presentment for payment. Again, a distinction is drawn between the drawer and the indorsers. Omission duly to protest discharges the indorsers, but the drawer is not discharged unless he shows affirmatively that the drawee or acceptor had funds to meet the bill.⁵

Art. 161.—A bill payable at a future time⁶ must ^{At what}be presented for payment on the day that it falls ^{time bill}payable ⁱⁿdue,⁷ as determined by Art. 20. ^{futuro.}

¹ Cf. Arts. 168, 169, and see Arts. 200, 201, as to excuses.

² Cf. *Rowe v. Young* (1820), 2 Bligh, H. L. at 467; German Exchange Law, Arts. 41 and 91.

³ *Soucard v. Palmer* (1818), 8 Taunt. 277; *Peacock v. Purcell* (1863), 32 L. J. C. P. 266.

⁴ Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at 262, 263, Ex. Ch.

⁵ French Code, Arts. 117 and 170; *Nouguier*, §§ 1147—1165.

⁶ Art. 19.

⁷ *Philpot v. Bryant* (1828), 4 Bing. at 720; *Latham v. Chartered Bank of*

Bill of exchange payable on demand. Art. 162. A bill of exchange payable on demand¹ must be presented for payment within a reasonable time.²

NOTE.—There seems to be no English decision in point. The cases have arisen either on cheques or notes. A cheque is intended for prompt presentment and not for negotiation (Art. 254), so it is doubtful how far the cases on cheques apply, even to an inland bill. A note, on the other hand, is a continuing security (Art. 285). Under the continental codes, a bill payable at sight must be presented for payment within the same limit of time that a bill payable after sight must be presented for acceptance. This seems the true principle; see Art. 150 on this point. As to the presentment of a bill which has been indorsed after its maturity see note to Art. 201.

Reasonable hour. Art. 163. Presentment for payment must be made during reasonable hours.³

Explanation 1.—When the payor is a trader, and the bill is payable at his place of business, reasonable hours mean the ordinary business hours of his trade.⁴

ILLUSTRATIONS.

1. Bill accepted payable at a bank. It must be presented during banking hours.⁵

2. Bill drawn on a merchant is presented for payment at his counting-house at 6.30. This may be a reasonable hour.⁶

3. Bill payable at the private residence of the payor is presented for payment at 8 p.m. This is a reasonable hour.⁷

India (1873), 17 L. R. Eq. 205; French Code, Art. 161; see e.g., *Wiffen v. Roberts* (1795), 1 Esp. 262, presentment on second day of grace; *Prideaux v. Collier* (1817, 2 Stark. 58, presentment on day after maturity.

¹ Art. 18,

² *Byles*, 12 ed., p. 209; *Story*, § 325; *National Bank v. Second Erie Bank* (1869), 63 Pennsylv. 404.

³ *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

⁴ *Elford v. Teed* (1813), 1 M. & S. 28; Cf. *Startup v. Macdonald* (1843), 6 M. & Gr. at 624; *Allen v. Edmundson* (1848), 2 Exch. at 723.

⁵ *Id.*; and *Parker v. Gordon* (1806), 7 East, 385; Cf. *Whittaker v. Bank of England* (1835), 1 C. M. & R. 750, banker's duty to pay.

⁶ *Morgan v. Davison* (1815), 1 Stark. 114; Cf. *Barclay v. Bailey* (1810), 2 Camp. 527, 8 p.m. Have business hours changed since then?

⁷ *Triggs v. Newnham* (1825), 10 Moore, 249; *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

NOTE.—The reasonableness of the hour must depend on whether Reason-
the payor's place of business is also his residence. He is not bound able hour.
to stay at his place of business after the usual hour. When a bill
is payable at the payor's residence, probably a presentment up to
bed-time would be sufficient. In America a presentment at 8 a.m.
and 11 p.m. have been held unreasonable: *Daniel*, p. 448.

Explanation 2.—When presentment is made at an
unreasonable hour, but payment is refused on some
other ground, the bill is deemed to have been duly
presented.¹

Art. 164. Presentment for payment must be made By whom.
by the holder of a bill, or by some person authorized
to receive the money on his behalf.² Cf. Art. 236.

Exception.—Presentment through the post-office
may be sufficient.³

NOTE.—*Duties of Agent.*—A collecting agent is, of course, liable
to his principal if he does not use due diligence in presenting a bill
for payment and take the proper proceedings on dishonour.⁴ The
same rule applies to a pledgee or person holding a bill as collateral
security.⁵ An agent is, as a rule, responsible for the default of a
sub-agent whom he employs; but in some of the American States an
exception is admitted when the sub-agent is a notary, on the ground
that he is a public officer.⁶

Art. 165. The person who presents a bill for pay- Bill must
ment must produce it, and must be ready and willing be pro-
to deliver it up on receiving payment.⁷ duced.

¹ *Henry v. Lee* (1814), 2 Chitty, 124; *Garnett v. Woodcock* (1817), 6 M. & S. 44; Cf. *Salt Spring Bank v. Burton* (1874), 58 New York R. 430.

² *Leftley v. Mills* (1791), 4 T. R. 175; *Walker v. Macdonald* (1848), 2 Exch. at 532; *Windham Bank v. Norton* (1852), 22 Connecticut R. 214; Cf. *Cole v. Jessop* (1854), 10 New York R. at 100.

³ *Heywood v. Pickering* (1874), 9 L. R. Q. B. 428 at 432; Cf. *Prideaux v. Criddle* (1869), 4 L. R. Q. B. at 461; *Windham Bank v. Norton* (1852), 22 Connecticut R. 214.

⁴ Cf. *Lubbock v. Tribe* (1838), 3 M. & W. at 612; *Lysaght v. Bryant* (1850), 19 L. J. C. P. at 160, Maule, J., Art. 149; and see *Deverill v. Burnell* (1873), 8 L. R. C. P. 475, measure of damage.

⁵ *Peacock v. Purcell* (1863), 32 L. J. C. P. 266.

⁶ *Daniel*, § 343; *Parsons*, p. 480.

⁷ Cf. *Hansard v. Robinson* (1827), 7 B. & C. at 94; *Griffin v. Weatherby* (1868), 3 L. R. Q. B. at 760, 761, and Arts. 205, 207.

Bill must be produced. NOTE.—If the bill be lost a copy should be presented—but *qu.* as to the sufficiency of this? A protest it seems can be made on a copy.¹ The provision that the loss of a bill shall not be set up in an action if an indemnity be given (Art. 144) hardly seems to meet the present case. As to the parts of a set, see Arts. 27 and 29.

To whom presentment must be made. Art. 166. (1.) A bill must be presented for payment at the proper place, as determined by Art. 167, either to the person designated by the bill as payor, or to some person authorized to pay or refuse payment on his behalf, if such person can there be found.² If, after the exercise of reasonable diligence, neither the payor nor such person can there be found the bill may be treated as dishonoured without any further demand on the drawee or acceptor.³

ILLUSTRATIONS.

1. A bill is accepted "payable at 1, Duke Street, London." The acceptor dies. Presentment at 1, Duke Street is sufficient without making search for the acceptor's executor.⁴

2. The acceptor of a bill accepts it payable at his banker's. The bill must be presented at the bank. A presentment to the acceptor personally is insufficient.⁵

3. A bill is addressed to "Mr. B., 1, Duke Street, London." B. accepts it generally. The bill is presented at 1 Duke Street, and the house is found shut up. This is sufficient.⁶

4. A bill is addressed to "Mr. B., 1, Duke Street, London." B. accepts it generally. The holder takes the bill to 1, Duke Street, and inquires for B. A woman living in the house informs him that B. has left. This is sufficient.⁷

¹ *Dehors v. Harriot* (1691), 1 Show. 163; *Pothier*, No. 145; *Brooks' Notary*, 4 ed., pp. 137 and 217.

² *De Bergareche v. Pillin* (1826), 3 Bing. 476; *Wilmot v. Williams* (1844), 7 M. & Gr. 1017; Cf. *Butterworth v. Le Despencer* (1814), 3 M. & S. 149.

³ *Brown v. McDermott* (1805), 5 Esp. 265; *Hine v. Allety* (1833), 4 B. & Ad. 624; *Buxton v. Jones* (1840), 1 M. & Gr. at 86.

⁴ *Philpot v. Bryant* (1827), 3 C. & P. 244; Cf. *Wilkins v. Jadis* (1831), 2 B. & Ad. 188.

⁵ *Gibb v. Mather* (1832), 2 Cr. & J. 254, Ex. Ch.; *Saul v. Jones* (1858), 23 L. J. Q. B. 37.

⁶ *Hine v. Allety* (1833), 4 B. & Ad. 624; Cf. *Crosse v. Smith* (1813), 1 M. & S. at 554.

⁷ *Buxton v. Jones* (1840), 1 M. & Gr. 83.

5. A bill is accepted payable at a bank. When the bill matures To whom the bank is the holder of the bill, but the acceptor has no assets present-ment must there. This is sufficient. No personal demand on the acceptor is be made. necessary.¹

(2.) Where a bill is addressed to, or accepted by, two or more persons who are not partners, and no place of payment is specified, presentment for payment must (probably) be made to them all.²

(3.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment for payment must be made to his executor or administrator, if such there be, and with the exercise of reasonable diligence he can be found.³

Art. 167. A bill is presented for payment at the proper place. At what place.

(1.) Where a place of payment is specified either by the drawer⁴ or by the acceptor and the bill is there presented.⁵

Explanation.—Where a bill is made payable at a bank in a town where there is a clearing-house, presentment through the clearing-house is deemed to be a presentment at that bank.⁶

(2.) Where alternative places of payment are specified, and the bill is presented at either of such places.

¹ *Bailey v. Porter* (1845), 14 M. & W. 44.

² *Union Bank v. Willis* (1844), 49 Massachus. R. 504; see *Gates v. Beecher* (1875), 60 New York R. 518, ex-partners; *Britt v. Lawson* (1878), 22 Hun. R. 123, New York, joint and several note.

³ *Byles*, 12 ed., 203; *Williams on Exors.*, 7 ed., p. 2003; Cf. *Caunt v. Thompson* (1849), 7 C. B. 400; French Code, Art. 163.

⁴ *Gibb v. Mather* (1832), 2 Cr. & J. 254, Ex. Ch.; Cf. *Boydell v. Harkness* (1846), 3 C. B. at 171; German Exchange Law, Art. 42; *Walker v. Stetson* (1869), 2 Amer. R. 405.

⁵ *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

⁶ *Reynolds v. Chettle* (1811), 2 Camp. 595; *Harris v. Parker* (1833), 3 Tyr. 370.

ILLUSTRATION.

At what
place.

B. makes a note payable at his house in Maidstone and at his bankers in London. Presentment at either place is sufficient.¹

(3.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill and the bill is there presented.²

(4.) Where no place of payment is specified, and no address given in the bill, but the bill is presented at the place of business of the drawee or acceptor, if he have one, and if not, at his residence.³

(5.) (Probably) in any other case if the bill is presented to the drawer or acceptor wherever he can be found.⁴

NOTE.—The sufficiency of a presentment depends on whether due diligence has been exercised or not. In any case⁵ it clearly would be prudent to make some further enquiry if the payor or some one to represent him was not found at the place. In America the rule is the same as in England, though perhaps it is rather more laxly applied. See the authorities collected in the note to *Berg v. Abbott*.⁶ It has been held in America that if the payor has a known residence a presentment to him in the street is insufficient, unless he waive the irregularity and refuse payment on some other ground.⁷ It has also been held that where no place of payment is specified in a note all the parties may orally agree upon a place, and that a presentment there is sufficient to charge the indorser.⁷ If the payor cannot be found the question is whether due diligence has been used in the endeavour to find him and make presentment. See Art. 168. Some of the foreign codes contain explicit provisions as to what is to be done in that case. German Exchange Law, Art. 91, provides that when a bill is not payable at a parti-

¹ *Beeching v. Gower* (1816), Holt, N. P. C. 313; Cf. *Pollard v. Herricks* (1803), 3 B. & P. 335.

² *Hine v. Allely* (1833), 4 B. & Ad. 624; better reported 1 N. & M. 433; *Buxton v. Jones* (1840), 1 M. Gr. 83.

³ Cf. *Mitchell v. Baring* (1829), 10 B. & C. at 9; *Shed v. Britt* (1823), 18 Massachus. R. 412; *Meyer v. Hibsher* (1872), 47 New York R. at 270; see *passim* *Crosse v. Smith* (1813), 1 M. & S. at 554.

⁴ *King v. Crowell* (1873), 14 Amer. R. 560.

⁵ *Berg v. Abbott* (1877), 24 Amer. R. 158.

⁶ *King v. Holmes* (1849), 11 Pennsylv. R. 456.

⁷ *Meyer v. Hibsher* (1872), 47 New York R. 265.

cular place it must be presented for payment at the office of the payee if he have one, and if not, at his residence. If his office and residence are unknown, inquiry is to be made of the police, and the fact that search has been made for him is to be recorded in the protest. Art. 180 of the Netherlands Code provides that "in case the person by whom the bill is to be paid is utterly unknown, or not to be found, the protest must be made at the post office of the place indicated for payment, and if there be no post office, at the office of the magistrate of the place. The same course must be pursued when a bill has been made payable at another place than that where the drawer resides and the domicile at which the payment must be made is not indicated." See, too, s. 1748 of the Draft Code of New York.

Art. 168. Presentment for payment is dispensed with—

Excuses
for non-
present-
ment.

- (1.) When the drawee is a fictitious person,¹ or (perhaps) a person not having capacity to contract.²
 - (2.) As regards the drawer or an indorser, when such drawer or indorser is, as between the parties to the bill, the principal debtor, and has no reason to expect that the bill would be paid if presented to the drawee or acceptor.³
- Cf. Art. 200.

ILLUSTRATIONS.

1. A. draws a bill on B., payable to his own order, and indorses it. B. accepts it to accommodate A. C. also indorses it to accommodate A. A. discounts it with D. A. does not provide B. with any funds to pay it. Presentment is not necessary to charge A.,⁴ but is necessary to charge C.⁵

2. A. draws a cheque on the "B. Bank," not having sufficient funds there to meet it, and having no reason to expect that it will be honoured. Presentment is not necessary to charge A.⁶

¹ *Smith v. Bellamy* (1817), 2 Stark. 223; Cf. Art 2.

² *Byles*, 12 ed., p. 187; *Chitty*, p. 202, *sed qu.*?

³ Cf. *Turner v. Samson* (1876), 2 L. R. Q. B. D. 23, C. A.; *Pothier*, No. 157.

⁴ *Terry v. Parker* (1827), 6 A. & E. 502.

⁵ *Saul v. Jones* (1858), 28 L. J. Q. B. 37.

⁶ *Wirth v. Austin* (1875), 10 L. R. C. P. 639.

Excuses
for non-
present-
ment.

NOTE.—As regards this excuse, presentment for payment and notice of dishonour are said in *Terry v. Parker*¹ to rest on the same grounds. As to French law, see Art. 160, n.

(3.) When, after the exercise of reasonable diligence, presentment cannot be effected. Cf. Art. 200.

Explanation.—The fact that the holder has reason to believe that the bill will, on presentation, be dishonoured, does not dispense with the necessity for presentment.²

ILLUSTRATIONS.

1. Bill drawn on B. is accepted by an agent. At the time the bill matures B. is abroad. This is no excuse, presentment should be made to the agent.³

2. B. makes a note "payable at Guildford." B. has no residence there. The note is presented at two banks, and then treated as dishonoured. This is sufficient.⁴

3. The drawer of a bill orders the drawee not to pay it. The holder hears of this. Presentment is not dispensed with.⁵

4. The acceptor of a bill informs the holder that he cannot, or will not, pay it when due. Presentment is not dispensed with.⁶

5. The acceptor of a bill becomes bankrupt before it matures. Presentment is not excused.⁷

6. B. makes a note payable at "1, X. Street, London." Before it becomes due he becomes insolvent and absconds. Presentment at 1, X. Street, is not dispensed with.⁸

NOTE.—In some American States there is a tendency to dispense

¹ *Terry v. Parker* (1837), 6 A. & E. 502 at 508. Cf. Art. 200.

² Cf. *Pothier*, No. 144—147; *Re East of England Co.* (1868), 4 L. R. Ch. at 18.

³ *Phillips v. Astling* (1809), 2 Taunt. 206.

⁴ *Hardy v. Woodroffe* (1818), 2 Stark. 319.

⁵ *Hill v. Heap* (1823), D. & R. N. P. C. 57; Cf. *Nicholson v. Gouthit* (1796), 2 H. Bl. 609.

⁶ *Baker v. Birch* (1811), 3 Camp. 107; *Ex parte Bignold* (1836), 1 Deac. 712.

⁷ *Esdaile v. Soverby* (1809), 11 East, at 117; *Howe v. Boies* (1813), 5 Taunt. 30 Ex. Ch.; *Pothier*, No. 147.

⁸ *Sands v. Clarke* (1849), 19 L. J. C. P. 84; *Pierce v. Cate* (1853), 66 Massachus. R. 190.

with the attempt to make presentment when such attempt would be futile.¹ This tendency is of doubtful expediency, and finds no favour in England. Cf. Art. 188, n.

Excuses
for non-
present-
ment.

(4.) By waiver, express or implied.²

Explanation.—Waiver of notice of dishonour does not include a waiver of presentment for payment.³

NOTE.—In Louisiana it is held that a waiver of protest does not include a waiver of presentment.⁴ German Exchange Law, Art. 42, provides that when the drawer or indorser inserts the term “protest waived,” presentment for payment is not waived thereby, but it lies on such drawer or indorser to prove that the bill has not been duly presented.

(5.) For the purpose of protesting for non-payment when a bill of exchange, payable elsewhere than at the residence of the drawee, is dishonoured by non-acceptance. Cf. Art. 179.

Art. 169. Delay in making presentment for payment is excused when such delay is caused by circumstances beyond the control of the holder, and not imputable to his negligence.⁵ Cf. Art. 201.

Excuses
for delay
in present-
ment.

ILLUSTRATIONS.

1. The holder of a bill dies suddenly just before it matures. The circumstances may be such as to excuse delay.⁶

2. Bill drawn in England, payable in Leghorn. At the time the bill matures Leghorn is besieged. The holder is not in Leghorn. This excuses delay.⁷

3. Bill presented for payment by post. It is sent off in time to

¹ See e.g., *Foster v. Julien* (1861), 24 New York R. 23.

² *Hopley v. Dufresne* (1812), 15 East, 275; Cf. *Ex parte Bignold* (1836), 1 Deac. at 737; *Sheldon v. Horton* (1870), 43 New York R. 93; Cf. Art. 121.

³ *Hill v. Heap* (1823). D. & R. N. P. C. 57; Cf. Art. 200.

⁴ *Wilkins v. Davis* (1868), 20 La. An. 538; *contra* in New York, *Coddington v. Davis* (1848), 1 New York R. 187.

⁵ *Pothier*, No. 144; *Nouguier*, §§ 1107, 1108; *Story*, § 327; Cf. *Rothschild v. Currie* (1841), 1 Q. B. at 47.

⁶ *Id.*

⁷ *Patience v. Townley* (1805), 2 Smith 223.

Excuses for delay in presentment. reach the drawee on the day of maturity, but by mistake of the post-office is delayed some days. The delay is (probably) excused.¹

4. Bill drawn in England, payable in Paris. By a French moratory law, passed in consequence of war, the maturity of bills payable in Paris is postponed three months. The delay in making presentment is excused.²

NOTE.—The cases do not clearly distinguish between excuses for non-presentment and excuses for delay in presentment, but surely when the question is one of reasonable diligence the distinction is an important one.³ If presentment is delayed at the request of the drawer or indorser sought to be charged, the delay is clearly excused.⁴

Dishonour by non-payment. Art. 170. A bill is said to be dishonoured by non-payment—(a) when it is duly presented for payment, and payment is refused or cannot be obtained;⁵ or (b), when presentment for payment is excused, and the bill is overdue and unpaid.

Consequence of dishonour. Art. 171. Subject to Art. 184 the holder of a bill which is dishonoured by non-payment acquires an immediate right of recourse against all antecedent parties, provided he take the necessary proceedings on dishonour.⁶

NOTE.—It seems that the holder's right of *action* against a drawer or indorser dates from the time when notice of dishonour is or ought to be received, and not from the time when it is sent.⁷

¹ *Windham Bank v. Norton* (1852), 22 Connecticut R. 214; *Pier v. Heinrichschoffer* (1877), 29 Amer. R. 501; Cf. Art. 201.

² *Rouquette v. Overmann* (1875), 10 L. R. Q. B. 525.

³ Cf. *Allen v. Edmundson* (1848), 2 Exch. at 724, notice of dishonour.

⁴ *Lord Ward v. Oxford Railway Co.* (1852), 2 De G. M. & G. 750.

⁵ Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Butterworth v. Despencer* (1814), 3 M. & S. 150.

⁶ *Ex parte Moline* (1812), 1 Rose, 303; *Siggers v. Lewis* (1834), 1 C. M. & R. 370,

⁷ *Castrigue v. Bernabo* (1844), 6 Q. B. 498.

Presentment for Payment to charge Acceptor.

Art. 172. When a bill of exchange is accepted generally (Art. 38) presentment for payment is not requisite in order to charge the acceptor.¹

Presentment to charge acceptor.

NOTE.—The reason is that at common law the debtor is bound to seek out his creditor to pay him.² The practical importance of the rule is that the acceptor cannot avail himself of any informality in the presentment. No one would be likely to bring an action without first applying for payment. Cf. Art. 283. In a note to *Wilmot v. Williams*³ Serjeant Manning suggests that if the holder were out of England during the whole of the day on which the bill matured, it might be necessary to prove a demand before the acceptor could be sued.

Explanation 1.—The acceptor may, by the terms of a qualified acceptance,⁴ make presentment for payment a condition precedent to his liability.⁵

ILLUSTRATION.

B. accepts a bill payable at the "X. Bank only." The holder must present it for payment at the X. Bank before he can sue B.⁶

Explanation 2.—When by the terms of an acceptance presentment is required, the acceptor, in the absence of express stipulation, is not discharged by the mere omission to present the bill for payment on the day it matures.⁷

NOTE.—When a bill is accepted payable at a particular place

¹ *Rouse v. Young* (1820), 2 Bligh. H. L. at 467, 468, Bayley, J.; *Fayle v. Bird* (1827), 6 B. & C. 531; Cf. *Mulby v. Murrels* (1860), 5 H. & N. at 823. See the old form of declaration against an acceptor or maker.

² *Cranley v. Hillary* (1812), 2 M. & S. 120; *Walton v. Mascall* (1844), 13 M. & W. at 458, Parke B.

³ *Wilmot v. Williams* (1844), 7 M. & Gr. at 1018.

⁴ Art. 39, as to qualified acceptances.

⁵ *Rouse v. Young* (1820), 2 Bligh. 391, H. L. as modified by 1 & 2 Geo. 4, c. 78.

⁶ *Halstead v. Skelton* (1843), 5 Q. B. at 93, 94, Ex. Ch.

⁷ *Smith v. Vertue* (1860), 30 L. J. C. P. 56 at 59; see *per* Keating, J., at 60, as to acceptance to pay at a particular place.

Present-
ment to
charge
acceptor.

and there only, the acceptor's position is analogous to that of the drawer of a cheque.¹ If, then, he could show that he was damaged by the holder's negligence in omitting to present, he would probably be discharged. Cf. Art. 258.

Presentment for Payment to charge Stranger to Bill.

Guarantor.

Art. 173. Presentment for payment is not a condition precedent to the liability of a person who has given a guarantee for the payment of a bill by the acceptor.²

NOTE.—The reason is that presentment is not necessary to charge the acceptor or maker (Art. 172). If the drawer were the party guaranteed, presentment would be necessary.

Person
liable on
considera-
tion.

Art. 174. A person who is not a party to a bill, but who is liable on the consideration for which it is given, is discharged by the holder's omission to present it for payment.³

Explanation.—The same diligence is not requisite in this case as is necessary to charge a party to the instrument. It is sufficient that the holder does what is reasonable to obtain payment.⁴

Noting and Protest.

Noting
defined.

Art. 175. "Noting" means a minute made by a notary public on a dishonoured bill at the time of its dishonour.

¹ *Bishop v. Chitty* (1742), 2 Stra. 1195; *Ramchurn v. Radakissen* (1854), 9 Moore P. C. at 70, Parke, B.

² *Walton v. Mascall* (1844), 13 M. & W. 452; *Nouguier*, § 1192; Cf. *Hitchcock v. Humphrey* (1843), 5 M. & Gr. 559.

³ *Anderton v. Beck* (1812), 16 East, 248; *Hopkins v. Ware* (1869), 4 L. R. Ex. 268; Cf. *Straker v. Graham* (1839), 4 M. & W. 721, presentment for acceptance.

⁴ *Sands v. Clarke* (1849), 8 C. B. at 761, Maule, J.; *Smith v. N. S. Wales Bank* (1872), 8 Moore P. C. N. S. at 461—463, Mellish, L. J. See e.g., *Robson v. Oliver* (1847), 10 Q. B. 704 at 717.

NOTE.—The “noting” consists of the notary’s initials, the date, the noting charges, and a mark referring to the notary’s register written on the bill itself. The notarial registers bear certain letters upon them, and a corresponding letter is put upon the bill as a mark. A ticket or label is also attached to the bill on which is written the answer given to the notary’s clerk who makes the notarial presentment, *e.g.*, “no orders,” “no advice,” or “no effects.” Before sending out the bill the notary makes a full copy of it in his register, and then subsequently adds the answer given, if any.¹

Nothing defined.

Art. 176. “Protest” means a formal notarial certificate attesting the dishonour of a bill.

Protest defined.

NOTE.—*Form, &c.*—See the term “notarial act” defined, Art. 45, n. The protest should contain (1) An exact copy of the bill, or the bill itself annexed. (2) A statement of the parties for whom and against whom the bill is protested. (3) The date of protesting and the place where protest is made. (4) A statement that acceptance or payment was demanded by the notary; the terms of the answer, if any; or a statement that no answer was given, or that the drawee or acceptor could not be found. (5) A reservation of rights against the parties liable. (6) The subscription and seal of the notary making the protest.² The protest must be stamped (see p. 275). A protest may be in duplicate or triplicate.³

Art. 177. The protest must be made by a notary public or other person authorized to act as such.⁴

By whom protest to be made.

NOTE.—When the services of a notary cannot be obtained at the place where the bill is dishonoured, it is said that a protest may be made by any respectable inhabitant in the presence of two witnesses.⁵ By 3 & 4 Will. 4, c. 70, attorneys in the country may be authorized by the Master of Faculties to practise as notaries. As to notaries in Ireland, see 9 Geo. 4, c. 24. In England the notarial presentment of the bill to the drawee or acceptor is almost always made by the notary’s clerk.⁶ In America the validity of a

¹ See *Brooks’ Notary*, 4 ed. p. 80, and Evidence before Select Committee on Bank Holidays Bill, 22 June, 1868 (House of Commons), especially the evidence at pp. 51—53.

² See *Brooks’ Notary*, 4 ed., p. 82; and for forms, see pp. 214—219; Cf. French Code, Art. 173; German Exchange Law, Art. 88.

³ *Brooks’ Notary*, 4 ed., p. 82; Cf. *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105.

⁴ *Byles*, 12 ed., p. 260; Cf. German Exchange Law, Art. 87; French Code, Art. 173.

⁵ *Byles*, 12 ed., p. 260; and Cf. 9 & 10 Will. 3, c. 17, § 1.

⁶ *Brooks’ Notary*, 4 ed., pp. 78 and 138; and *Thomson*, p. 310, as to Scotland.

By whom protest to be made. protest founded on such a presentment has been doubted: see *Parsons on Bills*, p. 641.

Time for protest. Art. 178. A foreign bill of exchange should be noted for protest on the day that it is dishonoured.¹

Explanation.—When a bill has been duly noted, the formal protest may (for purposes of suit in this country) be extended at any time.²

NOTE.—In practice foreign bills are sometimes not noted till the day after their dishonour.³ And it is conceived that if the bill has been duly presented this might be sufficient. Under 9 & 10 Will. 3, c. 17, inland bills (payable after date) are to be protested on the day following their maturity; but this Act has always been regarded as permissive, and inland bills are always noted on the day that they are dishonoured. By French Code, Art. 162, a bill is to be protested for non-payment on the day after it is due. By German Exchange Law, Art. 41, a dishonoured bill may be protested for non-payment on the day it is due, and it must not be protested later than the second day after. See the laws of different nations on the point collected: *Nouguier*, § 1270.

Where protest to be made. Art. 179. A bill must be protested at the place where it is dishonoured.⁴

Exception.—When a bill of exchange, drawn payable at a place other than the residence of the drawee, is dishonoured by non-acceptance “such bill shall or may be protested for non-payment” in the place where it is expressed to be payable without any further presentment to the drawee.⁵

ILLUSTRATION.

A bill drawn on B. in Liverpool, “payable in London,” but not saying where. It is presented for acceptance to B. in Liverpool.

¹ *Tassell v. Lewis* 1699, 1 Ld. Raym. 748; *Ch. Leitch v. Mills* 1791, 4 T. R. at 174.

² *Geraniopoli v. Water* 1851, 20 L. J. C. T. 705; *Ch. Leitch v. Mills* 1791, 4 T. R. at 174.

³ *Brooks' Notam*, 4 ed., n. 86.

⁴ *Ch. Mitchell v. Barrow* 1829, 10 B. & C. 4; French Code, Art. 178.

⁵ 2 & 3 Will. 4, c. 98 1832. See Appendix, nos. p. 284.

and dishonoured. The bill may be protested for non-payment in London without any further demand on B. Where protest to be made.

NOTE.—Previous to 2 & 3 Will. 4, c. 98, it seems that the bill must have been presented for payment to B. in Liverpool and protested for non-payment there.¹ The effect of the Act perhaps is to give the holder an option. Where a bill is presented through the post and returned by post dishonoured, it is conceived that it may be protested at the place to which it is returned, though no notarial presentment there is possible. This is the practice in Liverpool.

Art. 180. When laws conflict, the validity of a protest is determined by the law of the place where it is made.² Conflict of laws.

Protest to charge Drawer and Indorsers.

Art. 181. When a foreign bill of exchange³ is dishonoured it must be duly protested for non-acceptance or non-payment, as the case may be, in order that the holder may preserve his right of recourse against the drawer and indorsers.⁴ Protest—when necessary.

Explanation 1.—When a bill of exchange is dishonoured by non-acceptance and the holder, without lawful excuse, omits to protest it, the drawer and indorsers are discharged as regards such holder, and all subsequent holders, with notice that the bill has been so dishonoured; but the drawer and indorsers are not discharged as regards a subsequent holder for value who takes the bill before it is overdue, and without notice that it has been dishonoured.⁵

¹ *Mitchell v. Baring* (1829), 10 B. & C. 4.

² *Rothschild v. Currie* (1841), 1 Q. B. 43; *Rouquette v. Overman* (1875), 10 L. R. Q. B. 525; *Thomson*, p. 308; *Pothier*, No. 155; *Nouguier*, § 1270; Cf. Art. 202.

³ Art. 24, foreign bill defined.

⁴ *Gale v. Walsh* (1793), 5 T. R. 239; Cf. *Whitehead v. Walker* (1842), 9 M. & W. 506; *Ex parte Louenthal* (1874), 9 L. R. Ch. at 593.

⁵ Cf. *Dunn v. O'Keefe* (1816), 5 M. & S. 282 Ex. Ch.; and Art. 191.

Protest—
when
necessary.

Explanation 2.—When a bill of exchange has been dishonoured by non-acceptance, and duly protested, there may be a subsequent protest for non-payment at maturity.¹

NOTE.—*Qu.* if such subsequent protest is not necessary in some cases, at any rate for the purpose of recourse abroad? See too Art. 185. As before pointed out (Art. 157, n.) under the Continental Codes, no right of action arises on non-acceptance; the holder can demand security from the antecedent parties, but he is bound to re-present the bill at maturity. A foreign note, it seems, need not be protested for purposes of suit in England,² nor need an inland bill or note.³

Excuses
for non-
protest and
delay.

Art. 182. Protest is dispensed with (for purposes of suit in England) by circumstances which would dispense with notice of dishonour in the case of an inland bill; and delay in protesting is excused by circumstances which would excuse delay in giving notice of dishonour.⁴

NOTE.—As to notice of dishonour see Arts. 200, 201; and Cf. Arts. 168, 169, as to excuses for non-presentment for payment, or delay in presentment; see Art. 121, as to indorsements waiving protest, and Art. 165, n., as to protest of lost bill.

Protest for Better Security.

Better
security.

Art. 183. When the acceptor of a bill of exchange becomes bankrupt before its maturity, it may be protested for better security.⁵

NOTE.—Under some of the foreign codes, when the acceptor fails,

¹ *Campbell v. French* (1795), 6 T. R. at 211, 212, Ex. Ch.; Cf. *Whithead v. Walker* (1842), 9 M. & W. at 516.

² *Bonar v. Mitchell* (1850), 5 Exch. 415 at 417; Cf. *Burke v. McKay* (1844), 2 How. 66, Sup. Ct. U. S., Story, J.

³ *Windle v. Andrews* (1819), 2 B. & Ald. 696.

⁴ *Legge v. Thorpe* (1810), 12 East, 171; see e.g., *Campbell v. Webster* (1845), 15 L. J. C. P. 4, waiver; *Rothschild v. Currie* (1841), 1 Q. B. at 47, delay.

⁵ *Ex parte Wackerbath* (1800), 5 Ves. Jr. 574; *Chitty*, p. 237; *Brooks' Notary*, 4 ed., p. 88; for a form, see p. 219.

security can be demanded from the drawer and indorsers. See *e.g.* Better German Exchange Law, Art. 29. In England this cannot be done, security, and the only effect here of such a protest is that there may be an acceptance *suprà protest* (Art. 41). In France if the acceptor fails, the bill may be at once treated as dishonoured and protested for non-payment : French Code, Art. 163, and *Nouguier*, § 1277.

Presentment when there is a Reference in Need.

Art. 184. When a bill of exchange is dishonoured by non-acceptance or by non-payment, and the drawer of such bill has given a reference in case of need (Art. 7), the holder must (perhaps) present the bill for acceptance or payment *suprà protest* in order to preserve his right of recourse against the drawer and indorsers.¹

Holder's
duty to
present.

When the reference in case of need is given by an indorser, presentment for acceptance or payment *suprà protest* is (probably) optional.²

NOTE.—When a reference in need is given by the drawer, presentment in accordance therewith seems to be part of the original contract. It is like the case of a bill drawn payable at the house of some person other than the drawee. Again, in the case of a foreign bill, how is the question affected by the fact that presentment is obligatory according to the law of the place where the bill is drawn? By French law, when a reference in need is given by the drawer, the holder is bound to present, but when the reference is given by an indorser it seems he has an option : *Nouguier*, § 249—250. By German Exchange Law, Art. 62, presentment is in both cases obligatory.

Art. 185. A bill of exchange must be duly presented for payment to the drawee or acceptor and noted or protested for non-payment before it is

Duty to
protest for
non-pay-
ment.

¹ *Pothier*, No. 137, and the language of 6 & 7 Will. 4, c. 58 ; *post*, p. 265. Cf. Arts. 43 and 243.

² Cf. *Leonard v. Wilson* (1834), 2 Cr. & M. 589 at 595, and *passim Ex parte Prange* (1865), 1 L. R. Eq. at 5.

Duty to
protest for
non-pay-
ment.

presented for payment to the acceptor *suprà protest*¹ or referee in case of need.²

NOTE.—As to protest see Arts. 175 to 180. If the holder omit to protest he cannot sue the acceptor *suprà protest*; on the other hand, if the case of need pays without a protest, he pays at his own risk.³ As to acceptance *suprà protest*, see Arts. 41—48.

Time for
presenting
to acceptor
suprà
protest.

Art. 186. When the address of the acceptor *suprà protest* or referee in case of need is in the town or place where the bill is payable, the bill must be presented to him not later than the day following its maturity; and when the address of such acceptor *suprà protest* or referee in case of need is in a town or place other than the town or place where the bill is payable, the bill must be forwarded for presentation to him not later than the day following its maturity.⁴

In computing time non-business days are to be excluded.⁵

NOTE.—If the bill be not presented in due time to the acceptor *suprà protest*, it is conceived that he, and any party who would have been discharged if he had paid the bill, are discharged by the holder's laches, but there is no decision in point.⁶

Dishonour
by accep-
tor *suprà*
protest.

Art. 187. When a bill of exchange is dishonoured by the acceptor *suprà protest* it must (probably) be again protested in order to charge the other parties liable thereon.⁷

¹ *Hoare v. Cazenove* (1812), 16 East, 391; Cf. *Williams v. Germaine* (1827), 7 B. & C. at 475—477; German Exchange Law, Arts. 62 and 88.

² *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 510; Cf. German Exchange Law, Arts. 62 and 88.

³ Art. 241.

⁴ 6 & 7 Will. 4, c. 58, § 1; German Exchange Law, Art. 60. See *post*, p. 265.

⁵ 6 & 7 Will. 4, c. 58, § 2. See *post*, p. 265.

⁶ See terms of 6 & 7 Will. 4, c. 58, and Cf. *Story v. Batten* (1830), 3 Wend. R. 486, New York.

⁷ *Chitty*, p. 242; *Nouguier*, §§ 1320, 1321. No English decision; Cf. *Williams v. Germaine, jr.* (1827), 1 M. & Ry. 403; German Exchange Law, Arts. 62 and 89; *Brooks' Notary*, 4 ed., 108; Netherlands Code, Art. 181.

Notice of Dishonour to Charge Drawer and Indorsers.

Art. 188. "Notice of dishonour" means notification of dishonour, *i.e.* formal notice.¹

Notice of dishonour means notification.

Explanation.—The fact that the drawer or indorser of a bill knows that it has been dishonoured does not dispense with the necessity for giving him notice of dishonour.²

NOTE.—*Pothier* (No. 147), speaking of protests, lays down a similar rule: "la raison est que les formalités établies par les lois pour donner à quelqu'un la connaissance de quelque fait, ne se suppléent point, et ne s'accomplissent pas par équipollence." As regards notes and inland bills, notice of dishonour is the English substitute for protest.³ As regards foreign bills notice of dishonour is supplementary to protest. Under French Code, Arts. 165—166 (modified by law of May 3, 1862, *cf.* *Nouguier*, §§ 1086—1099), and German Exchange Law, Arts. 45—47, notice of protest must be given within certain definite limits of time. See *post*, Art. 195.

Art. 189. When a bill is dishonoured,⁴ due notice of dishonour, unless excused, is a condition precedent to the liability of the drawer or any indorser thereof.⁵

When necessary.

Explanation.—Due notice of dishonour means notice given in accordance with Arts. 192 to 199.

ILLUSTRATION.

Bill drawn by A. and indorsed by C. is dishonoured. Due notice is given to C., but none is given to A. The holder can sue C., but he cannot sue A.;⁶ nor has C. any remedy over against A.⁷

NOTE.—The holder's duty is fulfilled by giving notice to the

¹ *Burgh v. Legge* (1839), 5 M. & W. at 422, Alderson, B.; *Carter v. Flower* (1847), 16 M. & W. at 749, Parke, B.

² *Miers v. Brown* (1843), 11 M. & W. 372; *East v. Smith* (1847), 16 L. J. Q. B. 292; *Cf. Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

³ *Solarie v. Palmer* (1833), 7 Bing. at 533.

⁴ Arts. 156 and 170.

⁵ *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. at 642; *Rowe v. Tipper* (1853), 22 L. J. C. P. at 137, Maule, J.

⁶ *Cf. Rickford v. Ridge* (1810), 2 Camp. at 538.

⁷ *Miers v. Brown* (1843), 11 M. & W. 372.

When necessary. parties he intends to look to. If they in turn give notice to other parties, he may take advantage of it; but their omission to do so cannot prejudice him.

Consequence of omission to give notice of dishonour. Art. 190. Subject to Art. 191, the omission, without lawful excuse, to give due notice of dishonour to the drawer or any indorser of a bill discharges such drawer or indorser from his liability on the instrument, and also from any liability on the consideration for which it was given.¹

NOTE.—Under French Code, Arts. 168—170, the omission to give due notice of protest discharges the indorsers, but the drawer is not discharged unless he can show that the drawee had sufficient effects in his hands when he dishonoured the bill. Under German Exchange Law, Art. 45, the omission to give due notice of protest deprives the holder of his right to interest and damages, but he can still recover the amount of the bill, unless his omission has caused actual damage.

Bill dishonoured by non-acceptance and subsequently negotiated. Art. 191. When a bill of exchange is dishonoured by non-acceptance, and due notice of dishonour is not given to the drawer or an indorser thereof, such drawer or indorser is discharged as regards the holder at the time of dishonour, and all subsequent holders with notice thereof;² but such drawer or indorser is not discharged as regards a subsequent holder for value who takes the bill before it is overdue and without notice that it has been so dishonoured.³

Notice of dishonour, by whom to be given. Art. 192. Notice of dishonour must be given (a) by or on behalf of the holder,⁴ or (b) by or on behalf of an indorser who, at the time of giving it, is liable

¹ *Bridges v. Berry* (1810), 3 Taunt. 130; *Peacock v. Purcell* (1863), 14 C. B. N. S. 748.

² *Roscoe v. Hardy* (1810), 12 East, 434; *Bartlett v. Benson* (1845), 14 M. & W. 733.

³ *Dunn v. O'Keefe* (1816), 5 M. & S. 282, Ex. Ch.; Cf. *Whitehead v. Walker* (1842), 9 M. & W. 506; see, too, Art. 133, n.

⁴ See e.g., *Firth v. Thrush* (1828), 8 B. & C. 387, notice given by holder's attorney; *Viale v. Michael* (1874), 30 L. T. N. S. 463, by notary's clerk.

on the bill, and who has a right of recourse against the party to whom notice is given.¹

Notice of dishonour, by whom to be given.

ILLUSTRATIONS.

1. A bill indorsed by C. and held by D. is dishonoured. X., who was at one time employed by the drawer to get the bill discounted, but is not in any way acting on D.'s behalf, informs C. that the bill has been dishonoured. This is not sufficient; C. is discharged.²

2. C. is the first indorser of a dishonoured bill held by D. D. gives notice to C. one day late. C., on the *same* day, gives notice to the drawer; thus, as it were, making up for the lost day. This notice is ineffectual; for C., having been discharged by the holder's delay, is a mere stranger.³

3. A bill indorsed by C. is held by D. D.'s attorney gives notice of dishonour to the drawer, but by mistake gives it in C.'s name instead of D.'s. The notice is sufficient, provided C. is liable to D., and has a right of recourse against the drawer.⁴

4. C., the indorser of a bill, holds it as agent for the indorsee. C. presents it for payment, and it is dishonoured. Notice of dishonour given by C. in his own name is sufficient.⁵

Explanation 1.—A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonour.⁶

Explanation 2.—Notice of dishonour may be given by an agent in his own name or in the name of any party entitled to give notice.⁷

¹ *Chapman v. Keane* (1835), 3 A. & E. 193; *Story*, § 304; *Cf. Burgh v. Legge* (1839), 5 M. & W. at 420, and *Harrison v. Ruscoe* (1846), 15 M. & W. at 234 and 236, Parke, B.

² *Stewart v. Kennett* (1809), 2 Camp. 177; *Cf. East v. Smith* (1847), 16 L. J. Q. B. 292.

³ *Turner v. Leach* (1821), 4 B. & Ald. 451.

⁴ *Harrison v. Ruscoe* (1846), 15 M. & W. 231.

⁵ *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160.

⁶ *Rosher v. Kierun* (1814), 4 Camp. 86, as explained by *Harrison v. Ruscoe* (1846), 15 M. & W. at 235; *Cf. Briley v. Bodenham* (1864), 33 L. J. C. P. at 255, Erle, J.; see *Stanton v. Blossom* (1817), 14 Massachusetts R. 116, where drawee had no authority, and notice was held bad. *Cf. Art. 196.*

⁷ *Harrison v. Ruscoe* (1846), 15 M. & W. at 235.

In what
manner.

Art. 193. Notice of dishonour may be given by the party entitled to give it either personally, or by messenger or other agent,¹ or through the post-office.²

Explanation.—When notice of dishonour is sent by post the sender is not prejudiced by the delay or default of the post-office, but is deemed to have given due notice of dishonour.³

It lies on the sender to prove that the letter containing the notice was duly addressed and posted.⁴

NOTE.—The sufficiency of the direction on the letter is a question of reasonable diligence. If the drawer or indorser has a place of business the notice should be addressed to him there, if he has not then it should be addressed to him at his residence, and the party giving notice is bound to use reasonable diligence to discover such place of business or residence.⁵ When, however, the bill contains an address it seems that such address is in any case sufficient to charge the party giving that address.⁶ German Exchange Law, Art. 47, provides that when an indorser does not state his address notice may be sent to the indorser who precedes him.

For whose
benefit
notice
enures.

Art. 194. Notice of dishonour given by or on behalf of the holder enures for the benefit of (a) all subsequent holders, and (b) all prior indorsers liable on the bill who have a right of recourse against the party to whom notice is given.⁷

Notice of dishonour given by or on behalf of an indorser entitled to give notice,⁸ enures for the benefit

¹ Cf. *Pearson v. Crallan* (1805), 2 Smith, 404, as to messenger's expenses.

² *Stockin v. Collin* (1841), 7 M. & W. 515. Cf. Art. 201.

³ *Woodcock v. Houldsworth* (1846), 16 M. & W. 124, delay; *Mackey v. Judkins* (1858), 1 F. & F. 208, loss, Byles, J.; *Kenwick v. Tighe* (1860), 8 W. R. 391, loss.

⁴ *Hawkes v. Saller* (1828), 4 Bing. 715; Cf. *Skilbeck v. Garbett* (1845), 7 Q. B. 846.

⁵ *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. 639.

⁶ *Burmester v. Barron* (1852), 17 Q. B. 828; Cf. *Ex parte Baker* (1877), 4 L. R. Ch. D. at 799, C. A.

⁷ Byles, 12 ed., p. 285; *Stafford v. Gates* (1820), 18 Johns. 327, New York.

⁸ Cf. Art. 192.

of the holder and all indorsers liable on the bill who have a right of recourse against the party to whom notice is given.¹

For whose benefit notice enures.

NOTE.—In New York it has been held that notice duly sent by the holder does not enure for the benefit of a prior indorser, unless it reaches the party to whom it is sent, but the circumstances of the case were somewhat special.² See Art. 191 for a case where an indorser might be liable on the bill, and yet not able to avail himself of a notice of dishonour given by another, or to give one himself.

Art. 195. Notice of dishonour may be given by or on behalf of the holder as soon as the bill has been dishonoured,³ and it must be given within a reasonable time after dishonour.⁴

Notice of dishonour, when to be given.

Explanation 1.—Reasonable time is a mixed question of law and fact.⁵

Explanation 2.—In determining what is a reasonable time, non-business days must be excluded.⁶

Explanation 3.—When the person giving notice and the party to whom notice is to be given live in the same place, the notice must, in the absence of special circumstances, be sent off in time to reach such party on the day after the dishonour of the bill.⁷

Explanation 4.—When the person giving notice and the party to whom notice is to be given live in

¹ *Chapman v. Keane* (1835), 3 A. & F. 193; *Lysaght v. Bryant* (1850), 19 L. J. C. P. 160; *Strever v. Fort Edward Bank* (1866), 34 New York R. 413.

² *Beale v. Parish* (1859), 20 New York R. 407.

³ *Burbridge v. Manners* (1812), 3 Camp. 193; *Ex parte Molines* (1812), 1 Rose 303; *Hine v. Allely* (1833), 4 B. & Ad. 624; Cf. Art. 171.

⁴ *Hirschfield v. Smith* (1866), 1 L. R. C. P. at 351; *Gladwell v. Turner* (1870), 5 L. R. Ex. at 61.

⁵ *Id.*; Cf. Arts. 150, 162.

⁶ 39 & 40 Geo. 3, c. 42; 7 & 8 Geo. 4, c. 15; Bank Holidays Act, 1871; 34 & 35 Vict. c. 17, § 2; Cf. *Lindo v. Unsworth* (1811), 2 Camp. 601, as to a Jewish sacred festival; *Wright v. Shawcross* (1819), cited 2 B. & Ald. at 501, notice received on Sunday.

⁷ *Smith v. Mullet* (1809), 2 Camp. 208; *Hilton v. Fairclough* (1811), 2 Camp. 632; Cf. *Gladwell v. Turner* (1870), 5 L. R. Ex. at 61.

different places, the notice must, in the absence of special circumstances, be sent off on the day after the dishonour of the bill, if there be a post at a reasonable hour on that day;¹ and if there be no such post on that day, then by the next post thereafter.²

Notice of dishonour, when to be given.

NOTE.—Under French Code, Art. 165, the holder of a dishonoured bill must give notice of protest and commence proceedings within fifteen days of the date of protest, if the drawer or indorser sought to be charged live within five myriamètres. Extra time is given for extra distance. Thus, under Art. 166, as modified by the law of May 3, 1862, when a bill is payable in England the holder has one month for giving notice of protest and commencing proceedings against a French drawer or indorser. The notice of protest and the summons (*assignation en justice*) are usually comprised in one document, *Youguier*, §§ 1088—1089. Under German Exchange Law, Art. 45, the holder must send off written notice of protest within two days after protest.

Right of party receiving notice to transfer it within reasonable time.

Art. 196. A party who receives due notice of the dishonour of a bill has, after the receipt of such notice, the same time for giving notice to antecedent parties that the original holder has after the dishonour of the bill. Cf. Art. 195.

ILLUSTRATION.

C., the indorser of a bill held by D., receives notice of dishonour on Sunday morning. Sunday being a *dies non*, it is sufficient if C. send off notice to the drawer on Tuesday.⁴

Explanation 1.—When a bill is in the hands of an agent, the agent has the same time for giving notice to his principal that he would have if he were an

¹ *Williams v. Smith* (1819), 2 B. & Ald. at 500; and *Wright v. Shawcross*, cited at 501, n.

² *Hawkes v. Satter* (1828), 4 Bing. 715; *Carter v. Burley* (1838), 9 New Hamp. R. 558 at 570; Cf. *Geill v. Jeremy* (1827), M. & M. 61.

³ *Bray v. Hadlven* (1816), 5 M. & S. 68; Cf. *Rouse v. Tipper* (1853), 22 L. J. C. P. at 137; German Exchange Law, Art. 45; French Code, Arts. 167 and 169.

⁴ *Wright v. Shawcross* (1819), cited 2 B. & Ald. at 501.

independent holder and his principal an indorser liable to him.

Right of party receiving notice to transfer it within reasonable time.

ILLUSTRATIONS.

1. A bill payable in London is indorsed in blank by the holder, and deposited with a country banker for collection. The country banker's London agent presents it for payment and gives him due notice of its dishonour. The country banker on the day after the receipt of such notice gives notice to his customer, who in turn gives similar notice to his indorser. This indorser has received due notice.¹

2. C. indorses a bill to the Liverpool branch of the D. Bank. The Liverpool branch sends it to the Manchester branch, and the Manchester branch indorses it to the head office in London, who present it for payment. The head office sends notice of dishonour to the Manchester branch, the Manchester branch sends notice to the Liverpool branch, who gives notice to C. Each branch as regards time is to be considered a distinct party.²

3. X. pays a bill *suprà protest* for the honour of C., an indorser, who resides at Bruges, and the same day posts the bill to C. C. by return of post sends the bill back to X., who at once gives notice of dishonour to the drawer. Although six days have elapsed since the dishonour, the notice is in time, and X. can sue the drawer.³

NOTE.—See contra, *Ex parte Prange* (1865),⁴ where the authorities were not cited.

Explanation 2. — When a bill is presented for payment through the post-office, the drawee or acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonour,⁵ and has (probably) the same time for giving notice

¹ *Bray v. Hadwen* (1816), 5 M. & S. 63; Cf. *Firth v. Thrush* (1828), 8 B. & C. 387.

² *Clode v. Bayley* (1843), 12 M. & W. 51, approved *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Ca. at 332, P. C.

³ *Goodall v. Polhill* (1845), 14 L. J. C. P. 146.

⁴ 1 L. R. Eq. 1.

⁵ Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. at 255, Erle, J.

Right of party receiving notice to transfer it within reasonable time. that the holder would have if he himself presented it.¹

NOTE.—If the holder does not promptly get an answer from the drawee, it would be only prudent for him at once to give notice of dishonour himself.

Notice of dishonour to remote parties. Art. 197. The holder or other person entitled to give notice of dishonour must give notice to a remote party within the same limits of time that would suffice in the case of an immediate party.²

ILLUSTRATION.

A dishonoured bill drawn by A. is held by H., the tenth indorsee. H. has no longer time to give notice to A. than he has to give notice to his immediate indorser—*e.g.*, if A., the drawer, and H. live in the same town, H. must give notice to A. on the day following the dishonour of the bill.

NOTE.—If the holder does not give notice to a remote party in due time, he cannot rely on his own notice; but if he has given due notice to his immediate indorser, his rights may yet be saved by a notice given by such indorser; Cf. Art. 194.

Notice of dishonour, to whom to be given. Art. 198. Notice of dishonour must be given to the drawer or indorser intended to be charged, or to some person authorized to receive notice on his behalf.

Explanation 1.—It is the duty of a drawer or indorser, if he be absent from his place of business or residence, to see that there is some person there to receive notice on his behalf.³

ILLUSTRATIONS.

1. C. is the indorser of a bill which is dishonoured. Verbal notice given to his solicitor is not sufficient.⁴

¹ *Prideaux v. Criddle* (1869), 4 L. R. Q. B. at 461; Cf. *Heywood v. Pickering* (1874), 9 L. R. Q. B. 428. Cf. Art. 192, Expl. 1.

² *Rowe v. Tipper* (1853), 22 L. J. C. P. 135; Cf. *Nouguier*, § 1096.

³ Cf. *Allen v. Edmundson* (1848), 2 Exch. at 723; *Turner v. Leach* (1818), cited Chitty, 10 ed., p. 333. Art. 200, Cl. (6).

⁴ *Cross v. Smith* (1813), 2 M. & S. at 553.

2. X., who has authority to indorse for C., indorses a bill in C.'s name. Notice of dishonour given to X. is (perhaps) sufficient.¹

3. The drawer of a bill is a non-trader. Verbal notice of dishonour given to his wife at his house, in his absence, is sufficient.²

4. The indorser of a bill is a merchant. Notice of dishonour, verbal or written, given to or left with a clerk at his counting-house is sufficient.³

5. C. indorses a bill "in need at Messrs. X. & Co." Notice of dishonour given to X. & Co. is not sufficient to charge C.⁴

Explanation 2.—When the drawer or indorser of a bill becomes bankrupt, notice of dishonour may (probably) be given either to the bankrupt or to his trustee.⁵

NOTE.—All that has been actually decided is that notice given to the bankrupt in ignorance that the trustee had been appointed is sufficient. It is a question of reasonable diligence.⁶

Explanation 3.—If the drawer or indorser of a bill be dead, notice of dishonour must be given to his personal representatives, when, with the exercise of reasonable diligence, they can be discovered.⁷

NOTE.—In New York it is held that notice addressed and sent to an indorser, in ignorance of his death, is sufficient.⁸

Explanation 4.—When there are two or more joint drawers or indorsers who are not partners,

¹ Cf. *Firth v. Thrush* (1828), 8 B. & C. at 391.

² *Housego v. Cowne* (1837), 2 M. & W. 348; Cf. *Wharton v. Wright* (1844), 1 C. & K. 585.

³ *Allen v. Edmundson* (1848), 2 Exch. at 724; *Viale v. Michael* (1874), 30 L. T. N. S. 463.

⁴ *Ex parte Prange* (1865), 1 L. R. Eq. at 5.

⁵ *Ex parte Baker* (1877), 4 L. R. Ch. D. 795; Cf. *Rhode v. Proctor* (1825), 4 B. & C. 517.

⁶ *Ex parte Johnston* (1834), 1 Mon. & Ayr. at 628.

⁷ *Byles*, 12 ed., p. 289; *Massachusetts Bank v. Oliver* (1852), 64 Mass. R. 557.

⁸ *Merchants Bank v. Birch* (1819), 17 Johns. R. 24, New York.

Notice of dishonour, &c. notice of dishonour must (probably) be given to them all.¹

Notice of dishonour, requisites in form. Art. 199. Notice of dishonour may be given (a) in writing, or (b) by personal communication. The notice may be given in any terms² which—

- (1.) Sufficiently identify the bill.³
- (2.) Intimate that the bill has been dishonoured⁴ by non-acceptance or non-payment, and that the party to whom notice is given is held liable.⁵

Explanation 1.—A misdescription of the bill does not vitiate a notice unless the party to whom notice is given is in fact misled thereby.

ILLUSTRATION.

A notice to the drawer which describes the bill as payable at the "S. Bank," when in fact it was payable at the "T. Bank,"⁶ or which describes a bill of exchange as a note,⁷ or which transposes the names of drawer and acceptor,⁸ or which describes the acceptor by a wrong name,⁹ may be sufficient.

Explanation 2.—The notice need not expressly state that the bill has been presented and dishonoured,¹⁰ or protested, if protest be necessary,¹¹ or

¹ *Willis v. Green* (1843), 5 Hill 232, New York; Cf. *Hubbard v. Matthews* (1878), 54 New York R. 43.

² *Caunt v. Thompson* (1849), 18 L. J. C. P. at 127.

³ *Shelton v. Bruthwaite* (1841), 7 M. & W. 436; *Gates v. Beecher* (1875), 60 New York R. at 527.

⁴ See Arts. 159 and 170, defining "dishonour."

⁵ *Allen v. Edmundson* (1848), 2 Exch. at 723, Parke, B.; *Metcalf v. Richardson* (1852), 11 C. B. at 1014, Williams, J.; *Everard v. Watson* (1853), 1 E. & B. at 804, Lord Campbell.

⁶ *Bromage v. Vaughan* (1846), 16 L. J. Q. B. 10.

⁷ *Stockman v. Parr* (1843), 11 M. & W. 809; *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

⁸ *Mellersh v. Rippen* (1852), 7 Exch. 578.

⁹ *Harpham v. Child* (1859), 1 F. & F. 652.

¹⁰ *Paul v. Joel* (1859), 28 L. J. Ex. 143, Ex. Ch.

¹¹ *Ex parte Lencenthal* (1874), 9 L. R. Ch. 591.

that the party to whom notice is sent is called on to pay the bill.¹ It is sufficient that these facts can be reasonably inferred from the terms of the notice.

Notice of dishonour, requisites in form.

ILLUSTRATIONS.

1. "B.'s acceptance for 50*l.* due on Saturday is unpaid. He has promised to pay it in a week. I shall be glad to see you upon it." (Perhaps) insufficient.²

2. "I give notice that a bill, &c. (description), indorsed by you lies at 1, X. Street, dishonoured." Sufficient.³

3. The holder's clerk wrote to an indorser that "B.'s acceptance due that day was unpaid, and requested his immediate attention to it." Sufficient.⁴

4. "Your draft which became due yesterday is unpaid. Unless the same is paid immediately I shall take proceedings. Noting 5*s.*" Sufficient.⁵

5. The following notice left at the drawer's counting-house by the holder's clerk: "B.'s acceptance to A., 50*l.*, due January 1, is unpaid. Payment to D. is requested before 4 p.m." Sufficient.⁶

6. "D. Bank. I beg to intimate that B.'s acceptance to you due 1st January is still unpaid, and I have to request your immediate attention to the same." No signature. Sufficient.⁷

7. Notice to drawer of bill accepted by B. "Yours and B.'s note of hand is now due, and your attention to the same will oblige." Sufficient.⁸

NOTE.—Notices of dishonour are now construed very liberally. The House of Lords in *Solarte v. Palmer* (1834),⁹ decided that the notice must inform the holder, either in terms or by necessary implication, that the bill had been presented and dishonoured.

¹ *King v. Bickley* (1842), 2 Q. B. 419; *Miers v. Brown* (1843), 11 M. & W. 372; *Chard v. Fox* (1849), 14 Q. B. 200.

² *Furze v. Sharwood* (1841), 2 Q. B. 388.

³ *King v. Bickley* (1842), 2 Q. B. 419.

⁴ *Bailey v. Porter* (1845), 14 M. & W. 44, notice lost, and secondary evidence given of contents.

⁵ *Armstrong v. Christiani* (1848), 5 C. B. 687; *Everard v. Watson* (1853), 1 E. & B. 801.

⁶ *Paul v. Joel* (1858), 27 L. J. Ex. 380, affirmed 28 L. J. Ex. 143.

⁷ *Maxwell v. Brain* (1864), 10 L. T. N. S. 301.

⁸ *Bain v. Gregory* (1866), 14 L. T. N. S. 601.

⁹ 1 Bing. N. C. 194.

Notice of dishonour, requisites in form.

This inconvenient decision has frequently been regretted,¹ and is now, it seems, practically got rid of by considering it merely as an erroneous finding on a question of fact.² Since 1841 (see illustration 1, *supra*) it does not appear that any notice of dishonour has been held bad on the ground of insufficiency in form. In one case, Coleridge, J., suggested that a notice given by an indorser would be more strictly construed than a notice given by the holder.³

Explanation 3.—A written notice of dishonour need not be signed.⁴

Explanation 4.—An insufficient written notice may be supplemented and made valid by a personal communication.⁵

Explanation 5.—When notice is given by personal communication,⁶ or when a written notice is supplemented by a personal communication,⁷ the sufficiency of such notice is a question of fact.

ILLUSTRATIONS.

1. A person sent by the holder goes to the house of the drawer, who is not a trader, and not finding the drawer informs his wife that he has brought back the bill dishonoured. The wife says she will tell her husband. This may be sufficient.⁸

2. The holder's clerk goes to the drawer and tells him that his bill has been presented, and that the acceptor cannot pay it. The drawer replies that he will see the holder about it. This may be sufficient.⁹

3. A notary's clerk takes the bill, with the notary's ticket

¹ Cf. *Everard v. Watson* (1853), 1 E. & B. at 804, Lord Campbell,

² Per Bramwell, B., *Paul v. Joel* (1858), 27 L. J. Ex. at 384; see, too, *Maxwell v. Brain* (1864), 10 L. T. N. S. at 302.

³ Cf. *East v. Smith* (1847), 16 L. J. Q. B. 292, *sed qu.*?

⁴ *Maxwell v. Brain* (1864), 10 L. T. N. S. 301; Cf. *Paul v. Joel* (1858), 27 L. J. Ex. 381.

⁵ *Houlditch v. Cauty* (1838), 4 Bing. N. C. 411; Cf. *Paul v. Joel* (1858), 27 L. J. Ex. at 384.

⁶ *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

⁷ *Houlditch v. Cauty* (1838), 4 Bing. N. C. at 419; Cf. *Paul v. Joel* (1858), 27 L. J. Ex. at 384.

⁸ *Housoy v. Cowne* (1837), 2 M. & W. 348.

⁹ *Metcalfe v. Richardson* (1852), 11 C. B. 1011.

attached, to the drawer's office, and shows it to a clerk there. The clerk looks at it, says the drawer is out and has left no orders. The notary then leaves the usual notice that the bill is due at his office. This may be sufficient.¹

Art. 200. Notice of dishonour is dispensed with—
 (1.) When the drawer or indorser sought to be charged is as between the parties to the bill the principal debtor, and has no reason to expect that it will be honoured on presentment.

Excuses
for not
giving
notice of
dishonour.

ILLUSTRATIONS.

1. A. draws a bill on B., who is under no obligation to accept or pay it, and has not held out that he will do so. It is presented and dishonoured. A. is not entitled to notice.²

2. A. draws a bill on B. payable at his own house. B. accepts it. *Prima facie* this is an accommodation bill for A.'s benefit, and he is not entitled to notice.³

3. A. signs a bill as drawer in order to accommodate the acceptor. A. is entitled to notice.⁴

4. A., having a small balance in B.'s hands, draws on him for a larger sum. B. *accepts*, but does not pay. A. is entitled to notice.⁵

5. A., having a balance of 10*l.* at his bankers, and having no authority to overdraw, draws a cheque for 50*l.* A. is not entitled to notice.⁶

6. A. draws, B. accepts, and C. indorses a bill in order to accom-

¹ *Viale v. Michael* (1874), 30 L. T. N. S. 463. For further illustration, see *Phillips v. Gould* (1838), 8 C. & P. 355; *East v. Smith* (1847), 16 L. J. Q. B. 292; *Chard v. Fox* (1849), 14 Q. B. 200; *Jennings v. Roberts* (1855), 24 L. J. Q. B. 102.

² *Bickerdike v. Bollman* (1786), 2 Smith L. Ca., 7 ed. 50, and notes; *Claridge v. Dalton* (1815), 4 M. & S. 225; *Dickins v. Beal* (1836), 10 Pet. 572, Sup. Ct. U. S.; *Wirth v. Austin* (1875), 10 L. R. C. P. 689.

³ *Sharp v. Bailey* (1829), 9 B. & C. 44; Cf. *Carter v. Flocer* (1847), 16 M. & W. 743.

⁴ *Sleigh v. Sleigh* (1850), 5 Exch. 514.

⁵ *Thackray v. Blackett* (1812), 3 Camp. 164; Cf. *Bagnall v. Andrews* (1830), 7 Bing. at 222.

⁶ *Carew v. Duckworth* (1869), 4 L. R. Ex. 313.

Excuses
for not
giving
notice of
dishonour.

modate D., the second indorser. If the bill is dishonoured, A. and C. are entitled to notice.¹

7. A. draws and B. accepts a bill to accommodate X., who is not a party to it, but who is to provide for it. A. is entitled to notice of dishonour.²

8. A. draws, B. accepts, and C. indorses a bill in order to raise money for their joint benefit. A. and C. are entitled to notice.³

NOTE.—Cf. Art. 90, accommodation bill defined, and Art. 168, excuses for non-presentment. The acceptor is the principal debtor on the face of the instrument, but evidence is admissible to show that he is in reality a mere surety, and that some other person is ultimately liable.⁴ As to French law, see Art. 190, n.

(2.) As regards the drawer, when drawer and drawee are the same person, or identical in interest.⁵

(3.) When the drawer or indorser sought to be charged is the person to whom the bill is presented for payment.

ILLUSTRATIONS.

1. The indorser of a bill becomes the executor of the acceptor. It is presented to him and he refuses to pay it. He is not entitled to notice.⁶

2. One firm draws a bill upon another, which is accepted but afterwards dishonoured by non-payment. The two firms have a partner in common. Notice of dishonour to the drawers is (perhaps) excused.⁷

(4.) When the drawee is a fictitious person, or (perhaps) a person not having capacity to contract, and the drawer or indorser sought

¹ *Cory v. Scott* (1820), 3 B. & Ald. 619; *Turner v. Samson* (1876), 2 L. R. Q. B. D. 22, C. A.

² *Lafitte v. Slater* (1830), 6 Bing. 623.

³ *Foster v. Parker* (1876), 2 C. P. D. 18.

⁴ Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 127, per Willes, J.

⁵ Art. 2, Expl. 3; and *Porthouse v. Parker* (1807), 1 Camp. 82.

⁶ *Caunt v. Thompson* (1849), 18 L. J. C. P. 125.

⁷ *New York Contracting Co. v. Selma Savings Bank* (1874), 23 Amer. R. 552.

to be charged was aware of the fact at the time he drew or indorsed the bill.¹

Excuses
for not
giving
notice of
dishonour.

(5.) When the bill is void for want of a stamp.²

NOTE.—In this case the action must be brought on the consideration. The same reasoning would apply to a bill avoided by an alteration in the hands of an innocent holder.

(6.) When, after the exercise of reasonable diligence, notice of dishonour cannot be given to or does not reach the party sought to be charged.³

Explanation 1.—Reasonable diligence is a question of fact.⁴

ILLUSTRATIONS.

1. The holder of a dishonoured bill goes to the drawer's place of business during business hours to give him notice of dishonour. He finds the place shut and no one there of whom to make inquiries. This may excuse notice.⁵

2. The holder of a bill duly addresses and posts a notice of dishonour. It is lost in the post. The drawer or indorser to whom it was sent is not discharged.⁶

3. The holder of a dishonoured bill does not know the indorser's address. He makes some inquiry, but does not take the steps he reasonably might have done.⁷ The indorser is discharged.⁷

4. A bill is accidentally destroyed before maturity. The holder gives notice of the fact to the drawer. At maturity the holder cannot obtain payment. He must give notice of dishonour to the drawer.⁸

Explanation 2.—The fact that the drawer or in-

¹ *Leach v. Hewitt* (1813), 4 Taunt. 731; *Smith v. Bellamy* (1817), 2 Stark. 223; Cf. Arts. 2, 155, 168.

² *Cundy v. Marriot* (1831), 1 B. & Ad. 696.

³ Cf. *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. at 642, and Art. 168.

⁴ *Bateman v. Joseph* (1810), 2 Camp. at 462.

⁵ *Allen v. Edmundson* (1848), 2 Exch. at 723.

⁶ *Mackay v. Judkins* (1858), 1 F. & F. 208, Byles, J.; Cf. Arts. 193 and 194, n.

⁷ *Beveridge v. Burgis* (1812), 3 Camp. 262.

⁸ *Thackray v. Blackett* (1812), 3 Camp. 164; Cf. Art. 165.

Excuses
for not
giving
notice of
dishonour.

indorser sought to be charged has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for giving him notice of dishonour.¹

ILLUSTRATION.

The drawer or indorser of a bill has notice that the acceptor is bankrupt² or dead.³ He is entitled to notice of dishonour.

Explanation 3.—The bankruptcy or death of the drawer or an indorser does not dispense with the necessity for giving notice of dishonour to him or his representatives.⁴

(7.) By waiver express or implied.

Explanation 1.—Notice of dishonour may be waived before the time for giving notice has arrived, or after the omission to give notice.⁵

ILLUSTRATIONS.

1. The drawer of a bill tells the holder before it is due that he has no fixed residence, and that he will call in a few days to see if the acceptor has paid the bill. This waives notice.⁶

2. The drawer of a bill orders the drawee not to pay it. This (probably) waives notice.⁷

3. The drawer of a bill informs the holder that it will not be paid on presentment. This (probably) waives notice.⁸

4. The indorser of a bill receives no notice of dishonour. Six weeks after the dishonour he meets the holder and promises to pay the bill. This is a waiver of notice.⁹

¹ Cf. *Carew v. Duckworth* (1869), 4 L. R. Ex. at 319; and Art. 188.

² *Esdaile v. Sowerby* (1809), 11 East, 114; *Smith v. Becket* (1810), 13 East, 187; Cf. French Code, Art. 163.

³ Cf. *Caunt v. Thompson* (1849), 18 L. J. C. P. 125; French Code, Art. 163; *Pothier*, No. 147.

⁴ *Rhode v. Proctor* (1825), 4 B. & C. 517; and Art. 198.

⁵ Cf. *Cordery v. Colville* (1863), 32 L. J. C. P. 210; Story, § 320.

⁶ *Phipson v. Kellner* (1815), 4 Camp. 284; Cf. *Burgh v. Legge* (1839), 5 M. & W. 418.

⁷ *Hill v. Heap* (1823), D. & R. N. P. C. 57.

⁸ *Brett v. Levett* (1811), 13 East, at 214.

⁹ *Cordery v. Colville* (1863), 32 L. J. C. P. 210.

5. The drawer of a bill indorses it to C., who indorses it to D. On the day of dishonour, but before the fact of dishonour could be known, the drawer, knowing the acceptor to be insolvent, says to C., "I suppose I shall have to take up the bill. If you will call with it in a few days I will pay you." D. gives no notice of dishonour either to C. or the drawer. D. cannot avail himself of the promise to C., and sue the drawer.¹

Excuses
for not
giving
notice of
dishonour.

6. The drawer of a bill indorses it to C., who indorses it to D. Some time after the dishonour, the drawer, who has received no notice, is informed by C. that D. the holder is going to sue him. The drawer says he will pay if D. will give him time. This is evidence of waiver of notice.²

NOTE.—Cf. Art. 121, as to express waiver. Art. 168, waiver of presentment.

Explanation 2.—Waiver of notice of dishonour in favour of the holder enures for the benefit of parties prior to such holder as well as subsequent holders.

ILLUSTRATION.

C. indorses a bill to D., who indorses it to E. If C. be sued by E., and let judgment go by default, he cannot set up want of notice of dishonour if he be subsequently sued by D.³

Explanation 3.—Waiver of notice of dishonour by an indorser does not affect prior parties.

ILLUSTRATION.

C., the payee of a bill, indorses it to D. D. gives notice of dishonour to C. one day late. C. waives the irregularity, takes up the bill and gives notice to the drawer. C. cannot sue the drawer.⁴

Explanation 4.—An acknowledgment of liability

¹ *Pickin v. Graham* (1833), 1 Cr. & M. 725.

² *Woods v. Dean* (1862), 32 L. J. Q. B. 1. See further, *Lecann v. Kirkman* (1859), 6 Jur. N. S. 17; *North Stafford Co. v. Wythies* (1861), 2 F. & F. 563; *Kilby v. Rochusson* (1865), 18 C. B. N. S. 357; *Sheldon v. Horton* (1870), 43 New York R. 93.

³ *Rabey v. Gilbert* (1861), 38 L. J. Ex. 170; Cf. Art. 194.

⁴ *Turner v. Leach* (1821), 4 B. & Ald. 451; Cf. Art. 192.

Excuses
for not
giving
notice of
dishonour¹

must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonour.¹

ILLUSTRATION.

A bill is refused payment at maturity. The indorser promises the holder to pay it, not knowing that it had been previously dishonoured by non-acceptance. This is no waiver.

NOTE.—Many of the cases fail to distinguish between admissions of liability, which are evidence of due notice having been received, and admissions of liability when due notice has not been given, and which therefore are evidence of waiver. The distinction is important.² In America it has been held that a verbal waiver of notice may be revoked before the time for giving notice has expired.³

Excuses
for delay
in notice.

Art. 201. Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his negligence.

Explanation.—When the cause of delay ceases to operate, notice must be given with reasonable diligence.⁴

ILLUSTRATIONS.

1. The indorser of a bill gives a wrong address, or by his conduct misleads the holder as to his address. In consequence a notice posted in due time is a long while in reaching him. The delay is excused and the indorser is liable.⁵

¹ *Goodall v. Dolley* (1787), 1 T. R. 712; Cf. *Pickin v. Graham* (1833), 1 Cr. & M. at 729.

² As to what is evidence of due notice, see *Taylor v. Jones* (1809), 2 Camr. 105; *Hicks v. Beaufort* (1838), 4 Bing. N. C. 239; *Brownell v. Bonney* (1841), 1 Q. B. 39; *Curler v. Corfield* (1841), 1 Q. B. 814; *Campbell v. Webster* (1845), 15 L. J. C. P. 4; *Mills v. Gibson* (1847), 16 L. J. C. P. 249; *Jackson v. Collins* (1848), 17 L. J. Q. B. 142; *Bartholomew v. Hill* (1862), 5 L. T. N. S. 756. As to what is not, *Borradaile v. Lowe* (1811), 4 Taunt. 93; *Braithwaite v. Coleman* (1835), 4 N. & M. 654; *Bell v. Frankis* (1842), 4 M. & G. 445; *Holmes v. Staines* (1850), 3 C. & K. 19.

³ *Second Nat. Bank v. Maguire* (1877), 31 Amer. R. 539.

⁴ *Firth v. Thrush* (1828), 8 B. & C. 387; *Gladwell v. Turner* (1870), 5 L. R. Ex. at 61.

⁵ *Hewitt v. Thompson* (1836), 1 M. & Rob. 543; *Berridge v. Fitzgerald* (1869), 4 L. R. Q. B. 639.

2. The holder of a bill does not know the indorser's address. Excuses
Delay occupied in making inquiries is excused.¹ for delay
in notice.

NOTE.—For further illustration and authority see Art. 169, and Art. 193. This article is an obvious deduction from the general rule (Art. 195) that notice of dishonour must be given within a reasonable time. The old system of pleading recognised the difference between excuses for delay and excuses for non-notice.² When the delay is caused by the negligence of the party to whom notice is sent, it is conceived that though that party is bound he cannot give an effectual notice to antecedent parties.³

Overdue bill.—In America it is held that when a bill is indorsed after its maturity, the indorser is entitled to have it presented for payment, and to receive notice of dishonour within a reasonable time, he in effect having indorsed a bill payable on demand;⁴ *aliter* if an indorser take up a dishonoured bill and re-issue it on his original indorsement, for his liability is already fixed.⁵ Under German Exchange Law, Art. 16, the indorser of an overdue bill incurs no mercantile engagement.

Art. 202. Where laws conflict, the validity of a notice of dishonour, both as to form and time, is (probably) determined by the law of the place where the notice is given.⁶ Conflict of laws.

ILLUSTRATION.

A., in England, draws and indorses to C. a bill payable in Spain. C. indorses it to D., in Spain. It is presented for acceptance and dishonoured. Fifteen days afterwards, D. gives notice of dishonour to C. who immediately gives notice to A. By Spanish law no notice of dishonour by non-acceptance is necessary (Cf. Art. 157 n.). C. is liable to D., and if he pays him, he can sue A.⁷

NOTE.—It would be convenient to hold generally that the duties of the holder are to be determined by the law of the place where they are performed, but the cases certainly have not yet gone so far as this.

¹ *Balheir v. Richardson* (1823), 1 B. & C. 245.

² *Allen v. Edmundson* (1848), 2 Exch. at 723.

³ Cf. *Shelton v. Braithwaite* (1841), 8 M. & W. at 254—255.

⁴ *Patterson v. Todd* (1852), 18 Pennsylvania R. 433; *Essenlone v. Dillenback* (1878), 22 Hun. R. New York 23; Cf. *Dehers v. Harriot* (1682), 1 Show. 164.

⁵ *St. John v. Roberts* (1865), 31 New York R. 441.

⁶ *Hirschfeld v. Smith* (1866), 1 L. R. C. P. 340; *Horne v. Rouquette* (1878), 3 Q. B. D. 514, C. A.,; *Pothier*, No. 155; Cf. Art. 180.

⁷ *Horne v. Rouquette*, *supra*.

Notice to
acceptor
unneces-
sary.

Notice to charge Acceptor, Maker, or Stranger.

Art. 203. The acceptor of a bill of exchange is not in any case entitled to notice of dishonour.¹

ILLUSTRATION.

B. accepts a bill payable at his bankers. It is presented there and dishonoured. No notice need be given to B.²

Guarantor.

Art. 204. A person who has given a guarantee for the payment of a bill by the acceptor is not entitled to notice of dishonour. Cf. Art. 173.

ILLUSTRATIONS.

1. The indorser of a bill gives a bond to secure its payment. Want of notice of dishonour is no defence to an action on the bond.³

2. X. gives a guarantee for the price of goods to be supplied to the acceptor of a bill. X. is not entitled to notice of dishonour.⁴

3. X. gives a guarantee for the price of goods to be supplied to the drawer of a bill. X. is entitled to notice of dishonour.⁵

4. X. guarantees the payment of a note "if it be not duly honoured and paid" by the maker. X. is not entitled to notice of dishonour.⁶

NOTE.—In America the cases conflict. The balance of authority inclines to the view that notice of dishonour need not be given to a guarantor.⁷ It is prudent to give a guarantor some notice.

Person
liable on
considera-
tion.

Art. 205. A person who is not a party to a bill, but who is liable on the consideration for which it is given,⁸ is (probably) entitled to notice of dishonour. Cf. Art. 174.

¹ Cf. *Rowe v. Tipper* (1853), 22 L. J. C. P. at 137; *Pearse v. Pemberthy* (1812), 3 Camp. 261, maker of promissory note.

² *Treacher v. Hinton* (1821), 4 B. & Ald. 413.

³ *Murray v. King* (1821), 5 B. & Ald. 165.

⁴ *Holbrov v. Wilkins* (1822), 1 B. & C. 10.

⁵ *Philips v. Astling* (1809), 2 Taunt. 206; Cf. *Hitchcock v. Humphrey* (1843), 5 M. & Gr. at 564.

⁶ *Walton v. Mascall* (1844), 13 M. & W. 72, see also at 452.

⁷ See e.g. *Brown v. Curtis* (1849), 2 New York R. 225, *contra* *Fiske v. Brown* (1841), 2 McClean 369.

⁸ Cf. Arts. 224, 225.

ILLUSTRATIONS.

1. X. buys goods from D. to be paid for "by approved banker's bill." C., who is X.'s broker, obtains a banker's bill payable to his own order and indorses it to D. If the bill be dishonoured, X. (probably) is not liable for the price of the goods, unless he receives notice of dishonour.¹ Person
liable on
considera-
tion.

2. C., the *holder* of a note payable to bearer on demand, transfers it to D., without indorsing it, to pay for goods supplied by D. If the note be dishonoured, C. is not liable for the price of the goods, unless he receive notice of dishonour.²

NOTE.—It seems from the last cited cases² that the same strict and technical notice of dishonour is not requisite to charge a person liable on the consideration as is requisite to charge a party liable on the bill. This is fair, for in the one case the liability is transferable, in the other it is not, and therefore all defences between the parties can be inquired into. A distinction might be drawn between persons liable on the consideration who have, and who have not, been holders of the bill.³

Duties on receiving Payment.

Art. 206. It is the duty of the holder to deliver Duty to
give up
bill. up the bill when it is paid in due course, by or on behalf of the drawee or acceptor.⁴ Cf. Art. 165.

Exception 1.—Non-negotiable note.⁵

Exception 2.—The person who was the holder of a bill is (perhaps) entitled to receive payment, without giving it up, on proof of its destruction.⁶

¹ *Smith v. Mercer* (1867), 3 L. R. Ex. 51, *contra* *Swinyard v. Bowes* (1816), 3 M. & S. 62, not cited.

² *Camidge v. Allenby* (1827), 6 B. & C. 373; *Turner v. Stones* (1848), 1 D. & L. 122; *Robson v. Oliver* (1847), 10 Q. B. 707, cases on country bank notes; Cf. Art. 225.

³ Cf. *Camidge v. Allenby* (1827), 6 B. & C. at 381.

⁴ *Hansard v. Robinson* (1827), 7 B. & C. at 94; *Crowe v. Clay* (1854), 9 Exch. 604, Ex. Ch.; German Exchange Law, Art. 39; Cf. *Jones v. Broadhurst* (1850), 9 C. B. at 182; and *Duncan Fox v. N. and S. Wales Bank* (1880), 6 App. Cas. at 17, H. L., as to payment by drawer or indorser; and *Corner v. Taylor* (1854), 10 Exch. 441; *Woodward v. Pell* (1868), 4 L. R. Q. B. 55, *lien* for costs.

⁵ *Charnley v. Grundy* (1854), 14 C. B. at 614; Cf. Art. 107.

⁶ *Wright v. Maidstone* (1855), 24 L. J. Ch. 623.

Duty to
give up
bill.

NOTE.—Cf. Arts. 140 and 144 as to lost bills, and Arts. 27 and 29 as to the parts of a set. Giving up the bill is a concurrent condition, and not a condition precedent to payment. German Exchange Law, Arts. 38—39, provides that the holder must take part payment if it be offered. In that case he may retain the bill, but must indorse upon it the amount he has received.

Duty to
give re-
ceipt.

Art. 207. The holder of a bill for 2*l.* or upwards is (perhaps) bound, subject to a penalty of 10*l.*, to give a receipt on obtaining payment.¹ Such receipt may be written on the bill, and in that case does not require a stamp.²

NOTE.—The doubt is created by the terms of § 123, inasmuch as the receipt on a bill is exempt from duty. The payor clearly cannot refuse to pay because the payee refuses to give a receipt.³

¹ Stamp Act, 1870, 33 & 34 Vict. c. 97, §§ 121—123.

² Stamp Act, 1870, Sched., tit. Receipt.

³ *Laing v. Meader* (1824), 1 C. & P. 257.

CHAPTER VI.

LIABILITIES OF PARTIES.

Drawee and Drawer.

Art. 208. Subject to Art. 260 (*cheque on a banker*), a creditor, as such, is not entitled to draw on his debtor in respect of his debt; and the drawee of an unaccepted bill of exchange is under no obligation to accept or pay it unless he has for valuable consideration expressly or impliedly agreed to do so.¹

NOTE.—In some continental countries the duty to accept or pay bills arises from the mere relationship of debtor and creditor in a mercantile transaction; ² whereas here there must be an agreement founded on consideration. Apart from something special in the contract, it seems that the authority or obligation to accept is not revoked by the death of the drawer,³ while it is by notice of his bankruptcy; for this renders funds in the hands of the drawee no longer available for the payment of the bill, and incapacitates the drawer from fulfilling his part of the contract.⁴ The bankruptcy of

¹ *Chitty*, p. 200; Cf. *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 351, Ex. Ch.; see e.g., *Smith v. Brown* (1815), 6 Taunt. at 344; *Laing v. Barclay* (1823), 1 B. & C. 398; *Huntley v. Sanderson* (1833), 1 Cr. & M. 467 (agent authorised to draw on principal; contract of indemnity); *Cumming v. Shand* (1860), 29 L. J. Ex. at 132 (implied agreement to let customer overdraw); *English Credit Co. v. Arduin* (1871), 5 L. R. H. L. 64 (construction of credit).

² *Pothier*, No. 92; *Nouguier*, § 442; Belgian Code de Commerce, Art. 8.

³ *Chitty*, p. 193; *Story*, § 250; *Cutts v. Perkins* (1815), 12 Massachus. R. 206; Cf. *Billings v. Devaux* (1841), 3 M. & Gr. at 574; *Att.-Gen. v. Pratt* (1874), 9 L. R. Ex. 140.

⁴ *Pothier*, No. 96; Cf. *Citizens Bank v. New Orleans Bank* (1873), 6 L. R. H. L. 352.

Duty to
accept or
pay.

the drawer is not *per se* a breach of contract with the drawer.¹ In France the engagement between drawer and drawee is held to be a contract of "mandat," and their relations are regulated accordingly.²

Letter of Advice.—It is usual, but not necessary, for the drawer to advise the drawee of drafts drawn on him by letter of advice.³

Measure of
damages
against
drawee.

Art. 209. When the drawee breaks his contract with the drawer by dishonouring his draft, the consequences reasonably resulting from the breach of contract constitute the measure of damage.⁴

ILLUSTRATIONS.

1. A customer having a balance of 200*l.* at his banker's draws a cheque for 100*l.*, or accepts a bill for 100*l.* payable at his bankers. If this cheque or bill is dishonoured he may recover substantial damages for the injury to his credit, without proving any actual loss.⁵

2. A., in a foreign country, draws on B., in England, under a letter of credit. B. dishonours his draft. A. may recover the re-exchange and notarial expenses which he has had to pay to the holder,⁶ and also the cost of telegrams, etc., consequent on the dishonour.⁷

NOTE.—Although an acceptor, as such, may not be liable for re-exchange, it is clear that the drawee by accepting cannot alter or escape from his special contract with the drawer; and this may be the ground of his liability for re-exchange, etc., when sued by the drawer. Cf. Art. 213, n. As to paying a draft contrary to instructions, see *Twibell v. London Suburban Bank*.⁸

¹ *Ex parte Tondeur* (1867), 5 L. R. Eq. 160; Cf. *Ex parte Agra Bank* (1870), 9 L. R. Eq. at 733.

² *Polhier*, No. 91—100; *Bravard-Demangeat*, 7 ed., 219; Code Civil, Art. 1984—2010.

³ *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 586; *Nouguier*, §§ 281—214.

⁴ *Prehn v. Royal Bank of Liverpool* (1870), 5 L. R. Ex. 92; Cf. *Isley v. Jones* (1858), 78 Massachusetts. R. 260. accommodation bill.

⁵ *Rollin v. Steward* (1854), 23 L. J. C. P. 148; Cf. *Cumming v. Shand* (1860), 29 L. J. Ex. 129; *Summers v. City Bank* (1874), 9 L. R. C. P. 580; *Boyd v. Fitt* (1863), 14 Ir. C. L. R. 43.

⁶ *Walker v. Hamilton* (1860), 1 De G. F. & J. 602; *Re General South American Co.* (1877), 7 L. R. Ch. D. 637.

⁷ *Prehn v. Royal Bank of Liverpool* (1870), 5 L. R. Ex. 92.

⁸ *Twibell v. London Suburban Bank*, W. N., 1869, p. 127.

Drawee and Holder.

Art. 210. The drawee of a bill, as such, incurs no liability to the holder, and there is no privity of contract between them;¹ but privity may be created by agreement external to the bill, and the relations of the parties are then regulated by the terms of the agreement.²

ILLUSTRATIONS.

1. A., having 100*l.* at his banker's draws a cheque on them for that sum in favour of C. The cheque is dishonoured. C. has no remedy against the bankers.³

2. B. gives A. an open letter of credit authorizing him to draw to the extent of 10,000*l.*, and concluding "parties negotiating bills under it are requested to indorse particulars on the back hereof." A. accordingly draws a bill for 500*l.* in favour of C., who duly indorses the particulars on the credit. B. becomes insolvent, and dishonours the bill on presentment. C. can prove for 500*l.* against B.'s estate.⁴

3. A. draws a bill on B. in favour of C., and remits funds to meet it. B. does not accept the bill, but he tells C. that he has received the funds and promises to pay the bill. B. does not pay the bill. No action on the bill can be maintained against B., but C. can sue B. for money received to his use.⁵

NOTE.—Similarly, when a bill is accepted payable at a banker's, there is no privity between the drawer or holder and the acceptor's banker.⁶ In France, when the drawee has funds, drawing a bill operates as an assignment of them in favour of the holder, and

¹ *Hopkinson v. Forster* (1874), 19 L. R. Eq. 74; *Shand v. Du Buisson* (1874), 18 L. R. Eq. 283, bill of exchange; *Carr v. Nat. Bank* (1871), 107 Massachusetts R. 45; Cf. *Vaughan v. Halliday* (1874), 9 L. R. Ch. 561.

² *Robey v. Ollier* (1872), 7 L. R. Ch. 695; *Ranken v. Alfaro* (1877), 5 Ch. D. 786.

³ *Schroeder v. Central Bank* (1876), 34 L. T. N. S. 735.

⁴ *Re Agra Bank* (1867), 2 L. R. Ch. 391; Cf. *Ex parte Stephens* (1868), 3 L. R. Ch. at 756; *Union Bank v. Cole* (1877), 47 L. J. C. P. 100, C. A.; and *Citizens Bank v. New Orleans Bank* (1873), 6 L. R. H. L. 352.

⁵ *Griffin v. Weatherby* (1868), 3 L. R. Q. B. 753.

⁶ *Hill v. Royds* (1869), 8 L. R. Eq. 290; *Yates v. Bell* (1820), 3 B. & Ald. 642; *Moore v. Bushell* (1857), 27 L. J. Ex. 3.

No
privity
between
drawee
and
holder.

creates a privity between holder and drawee ;¹ and in Scotland the law appears to be the same.² See further Chapter XII. on Securities for Bills, *post*, p. 253, *Letter of Credit*. See the nature of a letter of credit explained by Lord Cairns,³ and an open credit distinguished from an ordinary credit by Brett, L.J.⁴

Acceptor and Holder.

Acceptor's
contract
with
holder.

Art. 211. The drawee of a bill of exchange becomes, by accepting it, the principal debtor thereon.⁵ As acceptor he undertakes that he will pay it according to the tenour of his acceptance.⁶

NOTE.—See the primary and absolute liability of an acceptor distinguished from the secondary and contingent liability of a drawer or indorser by Bayley, J.,⁷ and Cresswell, J.⁸ As to the mutual relations of joint acceptors, see per Wilde, C. J.⁹ See also Arts. 38—40, as to general and qualified acceptances, and Art. 172, as to presentment for payment to charge acceptor.

Acceptor's
estoppels.

Art. 212. The acceptor of a bill of exchange by the fact of acceptance conclusively admits and warrants to a *bonâ fide* holder—

- (1.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw.¹⁰

ILLUSTRATIONS.

1. A bill purporting to be drawn by A. on B. in favour of C., is

¹ *Bravard-Demangeat*, 7th ed. 235 ; *Nouguier*, §§ 392—431.

² *Thompson on Bills*, 2 ed., 104.

³ *Morgan v. Larivière* (1875), 7 L. R. H. L. at 432 ; and see the note to *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. at 109.

⁴ *Union Bank v. Cole* (1877), 47 L. J. C. P. at 109.

⁵ *Philpot v. Bryant* (1828), 4 Bing. at 720.

⁶ *Smith v. Vertue* (1860), 30 L. J. C. P. 56, see at 60, per Byles, J. ; Cf. *Walton v. Maswell* (1844), 13 M. & W. at 458, Parke, B. ; Cf. French Code, Art. 121 ; German Exchange Law, Art. 23.

⁷ *Rowe v. Young* (1820), 2 Bligh. H. L. at 467.

⁸ *Jones v. Broadhurst* (1850), 9 C. B. 181.

⁹ *Harmer v. Steele* (1849), 4 Exch. at 13.

¹⁰ *Cooper v. Meyer* (1830), 10 B. & C. 468 ; *Nat. Park Bank v. Ninth Bank* (1871), 46 New York R. 77.

accepted by B. and then negotiated. B., the acceptor, cannot set up that A.'s signature is a forgery.¹ Acceptor's estoppels.

2. A bill is drawn by A. on B. in favour of C. C. alters the amount from 10*l.* to 100*l.* and then indorses it away. B. subsequently accepts it. B., notwithstanding his acceptance, may (probably) set up the alteration as a defence.²

- (2.) In the case of a bill payable to drawer's order, the *then* capacity of the drawer to indorse,³ but not the genuineness of his indorsement,⁴ or (apparently) his authority to indorse.⁵

NOTE.—The distinction between capacity and authority (Cf. Art. 61) reconciles the cases. It is clear that capacity to draw must coincide with capacity to indorse, this being a question of status; while an authority to draw on behalf of another need not include an authority to indorse. The evidence of course may create an estoppel where the acceptance does not (Cf. Arts. 81, 139). *Fictitious Drawer*.—When the drawer of a bill payable to drawer's order is a fictitious person, the acceptor probably undertakes to pay to an indorsement in the same handwriting as the drawer's signature.⁶

- (3.) (Probably) in the case of a bill payable to a third person, the existence of the payee and his *then* capacity to indorse,⁷ though not the genuineness of his indorsement.⁸

¹ *Id.*; *Sanderson v. Collman* (1842), 4 M. & Gr. 209; Cf. *Orr v. Union Bank* (1854), 1 Macq. H. L. 513.

² *White v. Cent. Nat. Bank* (1876), 64 New York R. 316; Cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

³ *Braithwaite v. Gardiner* (1846), 8 Q. B. 473, bankrupt; *Smith v. Marsack* (1848), 18 L. J. C. P. 65, married woman; *Halifax v. Lyle* (1849), 3 Exch. 464, corporation not having power to issue bills.

⁴ *Beeman v. Duck* (1843), 11 M. & W. 251; Cf. *Smith v. Chester* (1787), 1 T. R. 654, and *passim* *Roberts v. Tucker* (1851), 16 Q. B. 560.

⁵ *Robinson v. Yarrow* (1817), 7 Taunt. 545, bill drawn and indorsed "per proc." without authority; *Garland v. Jacomb* (1873), 8 L. R. Ex. 216, Ex. Ch., bill drawn and indorsed by partner in non-trading firm without authority.

⁶ *Cooper v. Meyer* (1830), 10 B. & C. 468; *London and S. W. Bank v. Wentworth* (1880), 5 Ex. D. 96; but see dicta that such a bill is payable to bearer, *Beeman v. Duck* (1843), 11 M. & W. at 256; Cf. *Phillips v. Im Thurn* (1866), 1 L. R. C. P. at 471.

⁷ Byles, 12 ed., p. 199; *Daniel*, § 536; Cf. *Drayton v. Dale* (1823), 2 B. & C. 293 at 299.

⁸ Cf. *Roberts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

Acceptor's estoppels. NOTE.—The point has not arisen fairly. The maker of a note warrants the then capacity of the payee, but maker and payee are immediate parties, while acceptor and payee are not. The acceptor of course may be estopped by the evidence: see Art. 139 as to fictitious payee; see also Art. 81 for cases where a man may be precluded from saying that a false signature is not his own.

Damages against acceptor. Art. 213. The acceptor of a bill of exchange who dishonours it is liable for—

- (1.) The amount of the bill with interest (a) from the maturity thereof if the bill be payable on a day certain,¹ or (b) from the time of presentment for payment if the bill be payable on demand.²

Explanation.—Interest in the nature of damages may, if justice require it, be withheld wholly or in part,³ and when a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.⁴

NOTE.—As to interest proper see Art. 13, Expl. 4. The bill must be produced at the trial to entitle the plaintiff to interest before writ.⁵ By French Code, Art. 184, interest runs against all parties from the day of protest for non-payment.

- (2.) The notarial expenses consequent on dishonour.

NOTE.—It was formerly held that in the case of an inland bill, where noting is optional, the expenses of noting could only be

¹ *Lithgo v. Lyon* (1805), Coop. Ch. Ca. 29; *Laing v. Stone* (1828), 2 M. & Ry. 562.

² *Re East of England Banking Co.* (1868), 4 L. R. Ch. 14.

³ *Laing v. Stone* (1828), 2 M. & Ry. 562; see also *c.g.*, *Dent v. Dunn* (1812), 3 Camp. 296, tender; *Murray v. East India Co.* (1821), 4 B. & Ald. 204, holder dead and payment not demanded; *Phillips v. Franklin* (1828), Gow. 196, bill specially payable, no demand at place of payment proved; *Cf. Bann v. Dalryell* (1828), M. & M. 228.

⁴ *Keene v. Keene* (1857), 27 L. J. C. P. 88; see *Ward v. Morrison* (1842), Car. & M. 368, rate reduced; and see per Cotton, L.J., *Webster v. British Empire Ass. Co.* (1880), 15 Ch. D. at 175, 176, C. A.

⁵ *Hutton v. Ward* (1850), 15 Q. B. 26.

recovered as special damage, and that therefore a claim for noting Damages could not be included in a specially indorsed writ under s. 25 of against the C. L. P. Act, 1852.¹ But by s. 5 of the Bills of Exchange Summary acceptor. Procedure Act, 1855, the holder of every dishonoured bill has the same remedy for noting expenses that he has for the amount of the bill. This procedure has now been abolished as regards the High Court; but noting expenses have been allowed to be claimed in a specially indorsed writ under Order XIV.²

- (3.) (Perhaps) the loss on re-exchange incurred by an indorser who has taken up or paid the bill.³

NOTE.—The decisions might be reconciled by holding that the acceptor, as such, is not liable to the holder for re-exchange, but that he is liable to the drawer for re-exchange by reason of the special contract between drawer and drawee, see Art. 209; but perhaps the older cases would now be overruled if the point was raised directly.

Art. 214. When laws conflict the measure of Conflict of laws as to damage against the acceptor is determined by the damage. law of the place of payment.

ILLUSTRATION.

A bill drawn and accepted in France is by the acceptance made payable in London. Damages against the acceptor are to be assessed according to English law.⁴

Drawer or Indorser and Holder.

Art. 215. The drawer of a bill of exchange engages General liability of drawer. that on due presentment it shall be accepted and paid according to its tenour, and that if it be not so

¹ *Rogers v. Hunt* (1854), 10 Exch. 474.

² *Smith v. Wilson* (1879), 5 C. P. D. 5, C. A.

³ *Re General South American Co.* (1877), 7 Ch. D. 637, see at 644; *Pothier*, No. 117; *Story*, § 398; but *contra Napier v. Schneider* (1810), 12 East, 420; *Woolsey v. Crawford* (1810), 2 Camp. 445; *Dawson v. Morgan* (1829), 9 B. & C. at 620; *Byles*, 12 ed., p. 412.

⁴ *Cooper v. Waldegrave* (1840), 2 Beav. 282.

General liability of drawer. accepted and paid he will indemnify the holder, provided due notice of dishonour be given.

The drawer and indorsers of a bill are jointly and severally responsible to the holder for the due acceptance and payment thereof.¹

NOTE.—See the liabilities of the drawer stated in general terms by Lord Lyndhurst,² Parke, B.,³ Lord Kingsdown,⁴ Cresswell, J.,⁵ and Alderson, B.⁶ The liability of a drawer of an accepted bill must in general be measured by that of the acceptor, their relations being for many purposes those of principal and surety.⁷

Drawer's estoppels. Art. 216. The drawer of a bill of exchange payable to the order of another person, by the fact of drawing it, conclusively admits and warrants to a *bonâ fide* holder the existence of the payee and his *then* capacity to indorse.⁸

Who liable as indorser. Art. 217. Any person who signs a negotiable bill otherwise than as drawer or acceptor *primâ facie* incurs the liability of an indorser.⁹ Cf. Arts. 111, 112.

Exception.—Indorsement by way of receipt.¹⁰

ILLUSTRATIONS.

1. D. is the holder of a bill already indorsed in blank and therefore negotiable by mere delivery. He indorses it to E. D. thereby incurs the liabilities of an indorser.¹¹

¹ Cf. 18 & 19 Vict. c. 67, § 6; *Rouquette v. Overman* (1875), 10 L. R. Q. B. at 537; French Code, Art. 118; German Exchange Law, Arts. 8 and 49.

² *Siggers v. Lewis* (1834), 1 C. M. & R. at 371, cause of action.

³ *Whitehead v. Walker* (1842), 9 M. & W. at 516, non acceptance.

⁴ *Allen v. Kemble* (1848), 6 Moore P. C. at 321, *compensatio*.

⁵ *Jones v. Broadhurst* (1850), 9 C. B. at 181, payment.

⁶ *Gibbs v. Fremont* (1853), 9 Exch. at 30, damages.

⁷ *Rouquette v. Overman* (1875), 10 L. R. Q. B. at 536; but Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378, for an exception.

⁸ *Collis v. Emmet* (1791), 1 H. Bl. 313; Cf. *Phillips v. Im Thurn* (1865), 18 C. B. N. S. 694, see at 701; Cf. Art. 139.

⁹ *Steele v. McKinlay* (1880), 5 App. Cas. at 772, 782, H. L.

¹⁰ Cf. *Keene v. Beard* (1860), 8 C. B. N. S. at 382, Byles, J.

¹¹ Cf. *Fairclough v. Pavia* (1850), 9 Exch. at 695, and Arts. 109, 119.

2. B. makes a note payable to C. or order. After it is issued, Who D., to accommodate the maker, signs his name on the face of the note. D. is liable as an indorser.¹ liable as indorser.

3. B. and C. are indebted to A. A. draws a bill for the amount on B., payable to his own order, and indorses it in blank. B. accepts the bill. C. also writes his name on the face of the instrument. If B. does not pay it, C. may be sued as indorser.²

4. C. signs his name on the back of a blank stamped paper. It is afterwards filled up as a bill for 100*l*. C. is liable as an indorser of that bill.³

5. A bill is drawn payable to drawer's order and accepted. C. afterwards backs it with his signature. C. is liable as an indorser. If the bill be dishonoured parol evidence is not admissible to show that C. intended to guarantee the drawer. Such an agreement must be in writing to satisfy the Statute of Frauds.⁴

NOTE.—Formerly, when a person who was not the holder indorsed a bill, a pleading difficulty arose as to whether he was to be described as an indorser or as a new drawer. The difficulty was purely technical, for the consequences are identical. Now it would be sufficient to state the facts. The truth is that when a person who is not the holder backs a bill, he is not an indorser, but a quasi-indorser. The law annexes to his act liabilities similar to those which follow the indorsement of a bill by the holder (Cf. Arts. 111 and 112). In some American States he is regarded as an ordinary guarantor.⁵ The liabilities of the indorser of a non-negotiable bill or note are not clear. It seems he is not entitled to notice of dishonour.⁶ In New York he is regarded as an ordinary guarantor.⁷ As to indorser of overdue bill, see Art. 201, n. Under most of the continental codes the undertaking of a person who backs a bill without being the holder of it is called an *Aval*.⁸

¹ *Ex parte Yates* (1858), 2 De G. & J. 191; Cf. *Gwinnell v. Herbert* (1836), 6 N. & M. 723.

² *Young v. Glover* (1857), 3 Jur. N. S. 627, Q. B.; Cf. *Jackson v. Hudson* (1810), 2 Camp. 447.

³ Cf. *Steele v. McKinlay* (1880), 5 App. Cas. at 773, H. L.; *Foster v. Mackinnon* (1869), 4 L. R. C. P. at 712, and Art. 23.

⁴ *Steele v. McKinlay* (1880), 5 App. Cas. 754, H. L.

⁵ Cf. *Jones v. Goodwin* (1870), 2 Amer. R. 475, cases reviewed.

⁶ *Plimley v. Westley* (1835), 2 Bing. N. C. 249; Cf. *Gwinnell v. Herbert* (1836), 6 N. & M. at 726; *Jackson v. Slipper* (1869), 19 L. T. N. S. 640.

⁷ *Cromwell v. Hewitt* (1869), 40 New York R. 491, cases collected.

⁸ As to avals, see French Code, Arts. 142, 143; *Nouguier*, §§ 821—885; Spanish Code, Art. 475; Netherlands Code, Arts. 130—132; Italian Code, Arts. 226, 227.

General
liability of
indorser.

Art. 218. The indorser of a bill is in the nature of a new drawer.¹ Cf. Art. 215.

He engages that on due presentment it shall be accepted and paid according to its (then?) tenour, and that if it be not so accepted and paid he will indemnify the holder, provided due notice of dishonour be given.²

NOTE.—Is the indorser a new drawer of the same bill or a similar bill? The point has not fairly arisen. Lush, J., regards him as a new drawer of the same bill;³ but Alderson, B., regards the point as doubtful.⁴ See, too, Art. 60. For instance, a bill drawn in France is indorsed in England. Are damages to be assessed according to English or French law? Again, a bill which has been accepted conditionally is subsequently indorsed. Is the indorser liable according to the tenour of the bill or of the acceptance?

Indorser's
estoppels.

Art. 219. The indorser of a bill, by the fact of indorsing it, conclusively admits and warrants to a *bonâ fide* holder the genuineness and regularity in all respects of the drawer's signature and all previous indorsements.⁵

The indorser also warrants to his immediate indorsee that the bill is a valid and subsisting bill, and that he has a good title thereto.⁶

Damages
against
drawer or
indorser.

Art. 220. The drawer or indorser of a dishonoured bill is liable for damages at the following rates:—

(1.) *Inland bill*. The amount of the bill with

¹ *Penny v. Innes* (1834), 1 C. M. & R. at 441, Parke, B.

² *Suse v. Pompe* (1860), 30 L. J. C. P. at 78, Byles, J.; Cf. *Duncan Fox & Co. v. N. and S. Wales Bank* (1880), 6 App. Cas. at 18, per Lord Blackburn; German Exchange Law, Art. 14.

³ Cf. *Lebel v. Tucker* (1867), 3 L. R. Q. B. at 81.

⁴ *Gibbs v. Fremont* (1853), 9 Exch. at 31.

⁵ *Ex parte Clarke* (1792), 3 Brown C. C. 238; *Thicknesse v. Bromilow* (1832), 2 Cr. & J. 425; *McGregor v. Rhodes* (1856), 6 E. & B. 266.

⁶ *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; Cf. Art. 226.

interest¹ from (probably) the time of dishonour² together with the expenses of noting.³ Damages against drawer or indorser.

Explanation.—Interest in the nature of damages may, if justice require it, be withheld wholly or in part;⁴ and when a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.⁵

NOTE.—In one case it was said that interest as damages could only be recovered from the drawer or indorser from the time when he received notice of dishonour.⁶ But the case must be regarded as one when the jury under the circumstances exercised their discretion and withheld interest. When a bill is dishonoured by non-acceptance it would seem on principle that interest should only be allowed from its maturity, but the practice appears to be otherwise.⁷ By French Code, Art. 184, interest accrues from the day of protest for non-payment, and by German Exchange Law, Art. 50, from the day of non-payment.

(2.) *Foreign bill of exchange.* The amount of the bill with interest from the time of dishonour, and the notarial expenses, or if it be payable abroad, the re-exchange, interest and expenses.⁸

Art. 221. "Re-exchange" means the loss resulting from the dishonour of a bill of exchange in a Re-exchange and re-draft.

¹ *Windle v. Andrews* (1819), 2 B. & Ald. 696.

² *Keene v. Keene* (1857), 3 C. B. N. S. 144; Cf. Art. 213, and *Ackerman v. Ehrensperger* (1846), 16 M. & W. at 103.

³ *Smith v. Wilson* (1879), 5 C. P. D. 25, C. A. See note to Art. 213, Cl. (2.)

⁴ *Living v. Stone* (1828), 2 M. & Ry. 562, and Art. 213.

⁵ *Keene v. Keene* (1857), 3 C. B. N. S. 144, and Art. 213.

⁶ *Walker v. Barnes* (1813), 5 Taunt. 240; but Cf. *Siggers v. Lewis* (1834), 1 C. M. & R. 370.

⁷ *Harrison v. Dickson* (1811), 2 Camp. 52 n.; Cf. *Suse v. Pompe* (1860), 8 C. B. N. S. at 566, re-exchange on non-acceptance.

⁸ *Mellish v. Simeon* (1794), 2 H. Bl. 377, cumulative re-exchange against drawer; *Suse v. Pompe* (1860), 8 C. B. N. S. 538, see at 566, 567; Cf. *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. 133 at 146; French Code, Arts. 177—186; German Exchange Law, 50—54.

Re-
exchange
and re-
draft.

country different to that in which it was drawn or indorsed.¹

The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the then rate of exchange on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realise at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour.²

The holder may recoup himself by drawing a sight bill for such sum on either the drawer or one of the indorsers. Such bill is called a "Re-draft." The indorser who pays a re-draft may in like manner draw upon an antecedent party.³

ILLUSTRATION.

A., in England, draws a bill for 100*l.* on B., in Calcutta, payable there at a rate of exchange indorsed thereon. This entitles the holder to receive (say) Rupees 1000. The bill is dishonoured and the expenses of protest, etc., come to Rs. 10. The holder is then entitled to Rs. 1010 in Calcutta. At the time of dishonour sight bills on England are at 5 p. c. discount. Accordingly a sight bill on England for 106*l.* 1*s.* 0*d.*, would realise in Calcutta Rs. 1010. The holder may either draw a sight bill on A. for 106*l.* 1*s.* 0*d.*, and thus recoup himself, or he may sue A. in England for 105*l.* and interest, and 1*l.* 1*s.* 0*d.* expenses.

Explanation.—A custom according to which the holder may recover either the sum he gave for the bill or the re-exchange at his option is invalid,⁴ but a custom according to which a fixed rate of

¹ Cf. *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. at 146, P. C.

² *De Tastet v. Baring* (1809), 11 East, at 269; *Suse v. Pompe* (1860), 8 C. B. N. S. at 566, 567; German Exchange Law, Art. 50.

³ Cf. *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe* (1860), 8 C. B. N. S. at 565; French Code, Art. 178; German Exchange Law, Art. 53.

⁴ *Suse v. Pompe* (1860), 8 C. B. N. S. 538.

damages is substituted for re-exchange is (perhaps) Re-exchange and re-draft.
valid.¹

NOTE.—The term re-exchange is used to signify (1) the amount of a re-draft, (2) the loss on a particular transaction occasioned by the exchange being adverse, (3) the course of exchange itself, or (4) the right to the sum which would be secured by a re-draft; so the context must always be looked to. When English law governs the right to re-exchange arises on dishonour by non-acceptance, as well as on non-payment.² Under the continental codes it only arises on dishonour by non-payment. For the reason see Art. 157, n. See the subject of re-exchange carefully worked out, German Exchange Law, Arts. 49—54; French Code, Arts. 177—186; *Nouguier*, §§ 1336—1366.

Art. 222. When laws conflict, the measure of Conflict of laws as to damages.
damages against the drawer is determined by the law of the place where the bill was drawn,³ and against an indorser (probably) by the law of the place where he indorsed the bill.⁴

Transferor by delivery and Transferee.

Art. 223. The holder of a bill made or become Transferor by delivery defined.
payable to bearer, who negotiates it by delivery without indorsement, is called a "transferor by delivery."

NOTE.—Cf. Art. 106, negotiation defined; Art. 107, what bills are payable to bearer, and Art. 104, transfer of bill payable to order without indorsement. When a bill is transferred by delivery absolutely, the transaction is frequently spoken of as a sale of the bill. See the two meanings of the term "sale of a bill," pointed out Art. 83, n.

¹ *Willans v. Ayers* (1877), 3 L. R. Ap. Ca. at 144, P. C.

² Cf. *Susc v. Pompe* (1860), 8 C. B. N. S. at 566.

³ *Gibbs v. Fremont* (1853), 9 Exch. 25; *Re State Fire Ins. Co.* (1863), 32 L. J. Ch. 300.

⁴ Cf. *Allen v. Kemble* (1848), 6 Moore, P. C. at 321; *Gibbs v. Fremont*, *supra* at 30, and Art. 60.

Transferor
not liable
on instru-
ment.
Liability
on con-
sideration.

Art. 224. A transferor by delivery incurs no liability on the instrument.¹

Art. 225. A transferor by delivery is not liable on the consideration in respect of which he has transferred the bill, if the bill be dishonoured.²

Exception 1.—Bill given in respect of an antecedent debt.³

Exception 2.—A transferor by delivery is liable on the consideration to his immediate transferee when it appears that the transfer was not intended to operate in full and complete discharge of such liability.⁴

Explanation.—The transferee in order to avail himself of the above exceptions must use reasonable diligence in endeavouring to obtain payment, and in giving notice of dishonour or repudiating the transaction.⁵

ILLUSTRATIONS.

1. D., the holder of a bill for 100*l.* which has been indorsed in blank, discounts it with a banker for 90*l.*, without indorsing it. The bill is dishonoured. D. is not liable to refund the 90*l.*⁶

2. D. changes a banker's note or cashes a cheque payable to bearer for the convenience of the holder. If the bank has stopped payment, or the cheque is dishonoured, D. can recover the money.⁷

¹ *Ex parte Roberts* (1789), 2 Cox, 171; *Fenn v. Harrison* (1790), 3 T. R. 757; Cf. *Ex parte Isbester* (1810), 1 Rose, 21.

² *Read v. Hutchinson* (1813), 3 Camp. 352; Cf. *Van Wart v. Wolley* (1824), 3 B. & C. at 445, Abbot, C. J.; *Evans v. Whyte* (1829), 5 Bing. 485.

³ *Ward v. Evans* (1703), 2 Ld. Raym. at 930; Cf. *Camidge v. Allenby* (1827), 6 B. & C. at 382, Bayley, J., but *qu.* if this exception now applies to bank notes; *Guardians of Lichfield v. Greene* (1857), 26 L. J. Ex. at 142.

⁴ *Van Wart v. Wolley* (1824), 3 B. & C. at 446, Abbot, C. J.

⁵ *Rogers v. Langford* (1833), 1 Cr. & M. 642; *Moule v. Brown* (1838), 4 Bing. N. C. 266; *Robson v. Oliver* (1847), 10 Q. B. 704. Cf. Art. 174.

⁶ *Bank of England v. Newman* (1700), 1 Ld. Raym. 442.

⁷ *Turner v. Stones* (1843), 1 D. & L. 122, note; *Woodland v. Fear* (1857), 26 L. J. Q. B. 202; Cf. *Timmins v. Gibbins* (1852), 18 Q. B. 722, notes paid in to a bank and credited to customer.

Art. 226. A transferor by delivery, whether liable on the consideration or not, warrants to his immediate transferee that the bill is what it purports to be,¹ and that at the time of transfer he is not aware of any fact which renders it valueless.²

Warranty
of trans-
feror.

ILLUSTRATIONS.

1. C. discounts with D. a bill payable to bearer without indorsing it. It turns out that, unknown to C., the amount of the bill had been fraudulently altered by a previous holder. D. can recover from C. the money he paid.³

2. A bill broker discounts with a bank a bill indorsed in blank by the payee. The indorser absconds, and the signatures of the drawer and acceptor turn out to be forgeries. The bank can recover the money they paid from the bill broker.⁴

3. An agent gets a bank to discount a bill drawn and indorsed in blank by his principal, and then pays over the money to his principal. The signature of the acceptor was a forgery, but the agent did not know it. The drawer fails. The bank cannot recover from the agent.⁵

4. D., the *bonâ fide* holder of a bill purporting to be drawn by A., accepted by B., and indorsed in blank by C., discounts it with a banker. It turns out that the signatures of A. and B. were forgeries, and that C., whose indorsement was genuine, is insolvent. The banker can recover the money he paid from D.⁶

Explanation—When the transferee discovers the defect in the bill, he must repudiate the transaction with reasonable diligence.⁷

¹ *Gompertz v. Bartlett* (1853), 23 L. J. Q. B. 65, stamp previous to Stamp Act, 1870, § 52; Cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; *Pooley v. Browne* (1862), 31 L. J. C. P. 134.

² Cf. *Fenn v. Harrison* (1790), 3 T. R. at 769; *Camidge v. Allenby* (1827), 6 B. & C. at 382; *Lobdell v. Baker* (1842), 44 Massachus. R. 469; *Delaware Bank v. Jervis* (1859), 20 New York R. 228; *Bridge v. Batchelor* (1864), 91 Massachus. R. 394.

³ *Jones v. Ryde* (1814), 5 Taunt. 488.

⁴ *Fuller v. Smith* (1824), R. & M. 49.

⁵ *Ex parte Bird* (1851), 4 De G. & S. 273.

⁶ *Gurney v. Womersley* (1854), 24 L. J. Q. B. 46; *Merriam v. Wolcott* 1861, 85 Massachus. R. 258.

⁷ *Pooley v. Browne* (1862), 31 L. J. C. P. 134.

Warranty
of trans-
feror.

NOTE.—There is some confusion in the cases owing to the distinction between the warranty of genuineness and the liability on the consideration having been lost sight of. The warranty of genuineness is an incident of the contract of sale, and it is immaterial whether the thing sold be a bill or any other personal chattel. The transferor is for this purpose an ordinary vendor.¹ In New York the warranty is more extensive than in England. The transferor of a note warrants the solvency of the maker at the time of transfer.² *Story on Notes*, § 118, says the transferor also warrants his title to the bill. This probably is so; but the question could hardly arise except in the case of an overdue bill. Cf. Arts. 137 and 134.

Acceptor for Honour and Holder, &c.

Liability
of acceptor
for honour.

Art. 227. The acceptor *suprà protest* engages that he will on presentment pay the bill according to the tenour of his acceptance if it be not paid by the drawee, provided it has been duly presented for payment and protested for non-payment, and that he has notice of these facts.³

The acceptor *suprà protest* is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted.⁴

NOTE.—Under French Code, Art. 127, and German Exchange Law, Art. 58, an acceptor *suprà protest* is bound to give notice of his acceptance to the person for whose honour he has accepted. The rights of the acceptor for honour arise on payment. Under German Exchange Law, Art. 65, however, an acceptor for honour who is not called on to pay the bill is nevertheless entitled to a commission of one-third per cent.

Estoppel
binding
acceptor
for honour.

Art. 228. The acceptor *suprà protest* is bound by the estoppels which bind an ordinary acceptor, and

¹ Cf. *Benjamin on Sale*, 2nd ed., pp. 332 and 493.

² *Roberts v. Fisher* (1870), 43 New York R. 159.

³ *Hoare v. Cazenove* (1812), 16 East, 391, see at 394; *Williams v. Germaine* (1827), 7 B. & C. at 475—477 (head-note incorrect); Cf. Arts. 179, 185, 186; Cf. German Exchange Law, Arts. 60, 62, 63.

⁴ *Byles*, 12th ed., p. 268; *Bayley*, 6th ed., 178, no decision in point; Cf. Art. 244.

also by the estoppels which would bind the party for whose honour he accepted.¹

Estoppel
binding
acceptor
for honour.

Accommodation Party and person Accommodated.

Art. 229. (1) When a person draws, indorses, or accepts a bill for the accommodation of another, the person accommodated impliedly engages (a) that he will provide funds for the payment of the bill at maturity, (b) that if, owing to his omission so to do, the accommodation party is compelled to pay the bill, he will indemnify such party.²

Rights of
accommo-
dation
party.

ILLUSTRATIONS.

1. B. accepts a bill to accommodate the drawer. The drawer sends funds to B. to provide for the bill, but becomes bankrupt before the bill matures. B. can retain those funds to pay the bill with.³

2. A. signs a bill as drawer to accommodate the acceptor. It is dishonoured. A. receives no notice of dishonour, but nevertheless pays half the amount of the bill to the holder. A. cannot recover this sum from the acceptor, for he has not paid under compulsion.⁴

3. B. accepts a bill to accommodate the drawer, but is not provided with funds to pay it. There is some *prima facie* defence against the holder. B. is sued, defends the action, and has to pay the amount of the bill and costs. B. can recover from the drawer the amount he paid, including the costs of defending the action.⁵

4. A bill for 200*l.*, drawn abroad, is accepted for the accommo-

¹ *Phillips v. In Thurn* (1866), 1 L. R. C. P. at 471, S. C. on demurrer (1865), 18 C. B. N. S. 694; see *e.g.*, Art. 139, Illust. 4; Cf. Arts. 212, 216, 219.

² *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Steigh v. Steigh* (1850), 5 Exch. at 516, 517, Parke, B.; Cf. *Hawley v. Beverley* (1843), 6 M. & Gr. at 227; *Asprey v. Levy* (1847), 16 M. & W. 851.

³ *Yates v. Hoppe* (1858), 19 L. J. C. P. 180.

⁴ *Steigh v. Steigh* (1850), 5 Exch. 514.

⁵ *Stratton v. Matthews* (1848), 3 Exch. 48; *Baker v. Martin* (1848), 3 Barb. 634, New York, accommodation indorser; Cf. *Bagnall v. Andreus* (1830),

Rights of
accommodation
party.

dation of the first indorser. Acceptor and indorser fail. The holder gets 100*l.* from the acceptor and 100*l.* from the indorser. The indorser's estate pays 15*s.* in the pound. The acceptor, in proving on the contract of indemnity against the indorser, can get 50*l.*, which makes the total amount paid by the indorser on the bill (150*l.*) to be at the rate of 15*s.* in the pound.¹

NOTE.—See accommodation bill and accommodation party defined, Art. 90. An accommodation party who is compelled to pay the bill has all the rights of an ordinary surety in such case, *e.g.*, he is entitled to the benefit of all securities held by the creditor.² The Statute of Frauds does not require the contract of indemnity which arises out of an accommodation transaction to be in writing.³

(2.) Where two or more persons become parties to a bill to accommodate some third party, their rights and liabilities between themselves are those of co-sureties and must be determined irrespective of the position of their names on the instrument.⁴

ILLUSTRATION.

A bill is drawn by one person and indorsed by another for the accommodation of the acceptor. The drawer has to pay the bill. He can sue the indorser for contribution as a co-surety, though he could not sue him on the bill.⁵

NOTE.—It is conceived that there is nothing in this rule inconsistent with the decision of the House of Lords in *Steele v. McKinlay*,⁶ which merely decided that the drawer could not sue the indorser on the bill. The drawer there never suggested that he was entitled to contribution from the indorser as a co-surety.

7 Bing. at 222; *Garrard v. Cotterell* (1847), 10 Q. B. 679, *aliter* if the action be defended without reasonable cause; *Roach v. Thompson* (1830), M. & M. 487; *Beech v. Jones* (1848), 5 C. B. 696.

¹ *Ex parte European Bank* (1871), 7 L. R. Ch. 103.

² *Bechervaise v. Lewis* (1872), 7 L. R. C. P. at 377; *Gray v. Seckham* (1872), 7 L. R. Ch. 680.

³ *Batson v. King* (1859), 4 H. & N. 739.

⁴ *Reynolds v. Wheeler* (1861), 30 L. J. C. 350; Cf. *Batson v. King* (1859), 4 H. & N. at 741.

⁵ *Reynolds v. Wheeler* (1861), 30 L. J. C. P. 350.

⁶ *Steele v. McKinlay* (1880), 5 App. Cas. 754.

CHAPTER VII.

DISCHARGES.

Discharges in General.

Art. 230. A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a *bonâ fide* holder for value without notice he acquires no right of action on the instrument.¹

Discharge
defined.

ILLUSTRATION.

C. is in possession of a bill which has been discharged, *e.g.*, by payment in due course, or by an alteration. He indorses it to D., who indorses it to E. E. cannot sue either C. or D. as indorsers. He can only recover from D. the amount he paid for the bill, and D. in like manner can recover what he paid from C.²

NOTE.—A right of action on a bill must be distinguished from a right of action which a party to a bill may have arising out of the bill transaction, but wholly independent of the instrument. The former can be transferred by negotiating the instrument, the latter cannot. The former is extinguished by the discharge of the instrument, the latter may or may not be so. For example, if one of three joint acceptors pays a bill, it is discharged; but he personally has a right of contribution from his co-acceptors.³ If an accommodation acceptor pays a bill it is discharged, but he has a

¹ *Harmer v. Steele* (1849), 4 Exch. 1 Ex. Ch.; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

² *Burchfield v. Moore*, *suprà*; Cf. *Burbridge v. Manners* (1812), 3 Camp. at 194, payment; *Cundy v. Marriott* (1831), 1 B. & Ad. 696, stamp.

³ *Harmer v. Steele* (1849), 4 Exch. at 14; see the converse, *Houlc v. Baxter* (1802), 3 East. 177.

Discharge defined. personal right of action for indemnity. If an acceptance be given for a debt, and the acceptance is paid, both the debt and the bill are discharged. *Discharge of Parties.*—Again, the discharge of a bill must be distinguished from the discharge of one or more of the parties thereto, *e.g.*, the acceptor may be discharged by a discharge in bankruptcy while the drawer and indorsers are only liberated to the extent of the dividends or composition received by the holder;¹ or a particular indorser may be discharged by want of notice of dishonour, while the drawer and other indorsers remain liable; or again, an indorser may be discharged as regards a particular party, but not as regards subsequent parties.²

Discharge when laws conflict. Art. 231. When laws conflict the validity and effect of a discharge is (in general) determined by the *lex loci contractus* of the party sought to be charged.³ Cf. Art. 60.

ILLUSTRATIONS.

1. Bill accepted at Leghorn payable there. By the old law of Leghorn an acceptor could procure the cancellation of his acceptance if he had not at maturity received funds from the drawer. An acceptor so discharged at Leghorn cannot be sued in England.⁴

2. Bill drawn in the United States (and issued there) on a person in England is dishonoured by non-acceptance. The drawer cannot be sued in England if he has been discharged in America under the Bankruptcy law there in force.⁵

3. Bill for 100*l.* drawn and issued in Demerara but accepted and payable in England. At the time the bill matures the holder owes the acceptor 100*l.* According to Demerara law this operates as a discharge of the bill (by *compensatio*). The drawer is discharged.⁶

4. Accommodation bill drawn and issued in Austria, but accepted and payable in England is dishonoured. The holder receives from

¹ *Re Joint Stock Discount Co.* (1870), 10 L. R. Eq. 11; *Re Jacobs* (1875), 10 L. R. Ch. 211, composition under Act of 1869.

² Cf. *O'Keefe v. Dunn* (1815), 6 Taunt. 315; see *e.g.*, Art. 191.

³ Cf. *Ellis v. McHenry* (1871), 6 L. R. C. P. at 234.

⁴ *Burrows v. Jemino* (1726), 2 Stra. 733.

⁵ *Potter v. Brown* (1804), 5 East, 124; Cf. *Symons v. May* (1851), 6 Exch. 707.

⁶ *Allen v. Kemble* (1848), 6 Moore P. C. 315; Cf. *Wilkinson v. Simson* (1838), 2 Moore P. C. 275; *Compensatio* is recognised as a discharge in all countries where civil law prevails. See further on that subject *Nouguier* §§ 1053—1060; French Code Civil, Arts. 239—239.



the drawer in Austria a smaller sum in satisfaction of the bill. This, according to Austrian law, is a valid discharge. A subsequent indorser cannot sue the acceptor in England.¹ Discharge when laws conflict.

5. Bill drawn, accepted, and payable in England. The acceptor is made bankrupt and receives his discharge in Australia. He can be sued on the bill in England.²

Payment in due course.

Art. 232. A bill is discharged by payment in due course,³ that is to say, by payment in accordance with Arts. 234 to 236. Payment in due course a discharge.

NOTE.—*Satisfaction in general.*—No definition of payment is attempted, for “payment” is not a technical term.⁴ The holder of a bill is entitled to receive money (Cf. Arts. 10, 36), but when the time of payment comes he may, if he chooses, receive satisfaction in any other form. Any satisfaction which would operate as a discharge in the case of an ordinary contract to pay money is equally effectual in the case of a bill.⁵ Willes, J., seems to think this principle hardly wide enough having regard to the rule (Art. 239) that accord without satisfaction in some cases suffices.⁶ *Completion of Payment.*—Payment by a banker to a private individual is complete, and the property in the money passes to the payee when the money is laid on the counter.⁷ As regards what constitutes complete and irrevocable payment between banker and banker where there is a clearing-house, see the special verdict in *Warwick v. Rogers*;⁸ where there is no clearing-house, see *Pollard v. Bank of England*.⁹ *Proceeding for Costs.*—Where the holder of

¹ *Ralli v. Dennistoun* (1851), 6 Exch. 483, 36th plea and judgment at 493.

² *Bartley v. Hodges* (1861), 30 L. J. Q. B. 352.

³ *Morley v. Culverwell* (1840), 7 M. & W. at 182, Parke, B.

⁴ See per Maule, J., *Maillard v. Argyle* (1483), 6 M. & Gr. at 45.

⁵ See e.g., cases discussed on this basis. *Cripps v. Davis* (1843), 12 M. & W. 159, agreement to set off another debt; *Sibree v. Tripp* (1846), 15 M. & W. 23, negotiable bill for less amount; *Ford v. Beech* (1848), 11 Q. B. 852, Ex. Ch. agreement to suspend; *Ansell v. Baker* (1850), 15 Q. B. 20, merger; *Belshaw v. Bush* (1851), 11 C. B. 207, bill of third party; *Woodward v. Pell* (1868), L. R. Q. B. 55, debtor taken in execution; Cf. Art. 251.

⁶ Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 126; *Abrey v. Cruz* (1869), 5 L. R. C. P. at 44.

⁷ *Chambers v. Miller* (1862), 32 L. J. C. P. 30.

⁸ *Warwick v. Rogers* (1843), 5 M. & G. 340.

⁹ *Pollard v. Bank of England* (1871), 6 L. R. Q. B. 623.

Payment in due course a discharge. a bill sued concurrently two or more of the parties thereto and is paid by one of them he may still proceed against the others for costs incurred.¹ *Presumption of Payment.*—It seems that there is a presumption of payment in the case of a bill or note which is 20 years old quite apart from the Statute of Limitations.²

Part payment. Art. 233. Part payment of a bill in due course operates as a discharge *pro tanto*.³

NOTE.—As to part payment by the drawer or an indorser, see Art. 234, Expl. 2. Under German Exchange Law, Art. 38, the holder cannot refuse part payment, but this is clearly not English law. Cf. Arts. 39 and 158, and 206.

Payment, by whom. Art. 234. Payment in order to operate as a discharge of the bill must be made by or on behalf of the drawee⁴ or acceptor.⁵

ILLUSTRATIONS.

1. A bill is accepted by three joint acceptors (not partners). One of them pays it at maturity. The bill is discharged and cannot be again negotiated. It is immaterial that the acceptor who paid accepted the bill for the accommodation of the other two.⁶

2. A bill accepted payable at a bank and indorsed in blank by C. is sent to D. to collect. D. improperly discounts it. To regain possession, D. goes to the acceptor's bankers, pays in the amount of the bill, and asks to have the bill given up to him, when the holder has been paid. This is done. The bill is not discharged. C. can sue the acceptor.⁷

3. C. is the holder of a dishonoured bill indorsed in blank. D. pays the amount and costs to C. in order to get the bill and sue

¹ *Randall v. Moon* (1852), 21 L. J. C. P. 226, as explained by *Cook v. Lister* (1863), 32 L. J. C. P. at 127; *London and Sub. Bank v. Walkinshaw* (1872), 25 L. T. N. S. 704.

² *Cf. Bronen v. Rutherford* (1880), 14 Ch. D. 687, C. A.

³ *Graves v. Key* (1832), 3 B. & Ad. 313; *Cf. Cook v. Lister* (1863), 32 L. J. C. P. at 125, Willes, J.; French Code. Art. 126; German Exchange Law, Arts. 38, 39.

⁴ *Wilkinson v. Simson* (1838), 2 Moore P. C. at 287, Parke, B.

⁵ *Callone v. Lawrence* (1814), 3 M. & S. at 97, Ld. Ellenborough; *Jones v. Broadhurst* (1850), 9 C. B. at 181, Cresswell, J.

⁶ *Harmer v. Steele* (1849), 4 Exch. at 13, 14, Ex. Ch.; *Cf. Bartrum v. Cuddy* (1838), 9 A. & E. 275, note on demand paid by accommodation maker.

⁷ *Deacon v. Stodhart* (1841), 2 M. & Gr. 317; *Thomas v. Fenton* (1847), 5 D. & L. 28, see at 38; *Cf. Waller v. James* (1871), 6 L. R. Ex. 124.

on it. C. parts with the bill under the impression that D. has Payment, paid it on behalf of the acceptor. The bill is not discharged. D. by whom. can sue the drawer.¹

4. A joint and several note is paid at maturity by one of the makers. The note is discharged.²

Explanation 1.—Payment of an accommodation bill by the person accommodated is deemed to be a payment made on behalf of the acceptor, and operates as a discharge.³

ILLUSTRATION.

A bill is accepted for the accommodation of the drawer. The drawer negotiates the bill, and then takes it up at maturity. Subsequently he re-issues it. The holder cannot sue the acceptor, for the bill is discharged.⁴

NOTE.—See Art. 99, defining “accommodation bill.” The discharge may be supported on the ground adopted by Willes, J., that the person accommodated pays as the acceptor’s agent, or on the ground that the bill has been paid by the principal debtor. Cf. Art. 245, as to principal and surety, and Art. 134, n., equities attaching to overdue bill.

Explanation 2.—Subject to Expl. 1, payment by the drawer or indorser of a bill, as such, is not a discharge of it,⁵ but is merely a purchase thereof, remitting him to his former rights against antecedent parties,⁶ and enabling him, if the form of the bill permit, to re-issue and further negotiate it.

¹ *Lyon v. Maxwell* (1868), 18 L. T. N. S. 28.

² *Beaumont v. Greathead* (1846), 2 C. B. 494.

³ *Cook v. Lister* (1863), 32 L. J. C. P. at 127, Willes, J., see also *Lazarus v. Cowie* (1842), 3 Q. B. 459, criticised but followed in *Jewell v. Parr* (1853), 13 C. B. 909, apparently approved, *Parr v. Jewell* (1855), 16 C. B. 684 at 709, Parke, B., Ex. Ch.; *Jones v. Broadhurst* (1850), 9 C. B. at 181 and 189; *Ralli v. Dennistoun* (1851), 6 Exch. 483, 36th plea and judgment at 493; *Strong v. Foster* (1855), 17 C. B. at 222; *Re Oriental Bank* (1871), 7 L. R. Ch. at 102.

⁴ *Lazarus v. Cowie*, *suprà*; Cf. Art. 230, discharge defined.

⁵ *Jones v. Broadhurst* (1850), 9 C. B. 173; *Kemp v. Balls* (1854), 10 Exch. 607; *Woodward v. Pell* (1868), 4 L. R. Q. B. 55.

⁶ Cf. *Duncan Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at 17, per Ld. Blackburn.

ILLUSTRATIONS.

Payment,
by whom.

1. The acceptor of a bill, originally payable to drawer's order, dishonours it. The drawer pays the holder and gets the bill. He may either sue the acceptor himself, or he may strike out his own and the subsequent indorsements and again negotiate the bill away.¹

2. A bill drawn by A., payable to C. or order, and by C. indorsed to D., is dishonoured by the acceptor at maturity. The drawer pays D. and gets the bill. He may sue the acceptor, but he cannot re-issue the bill.² *Aliter*, it seems, if C. or D. had indorsed in blank.³

3. The acceptor of a bill becomes bankrupt. C., a holder of the bill, who had indorsed it away before the bankruptcy, takes it up after the bankruptcy. C. can set off the bill against any claim the acceptor's trustee may have against him.⁴

4. The C. bank discount a bill, which is accepted payable at their house, and then indorse it away. At maturity it is presented to the C. bank and paid. It is a question of fact whether they paid as the agents and bankers of the acceptor, or whether they took up the bill as indorsers. In the latter case it is not discharged, and they can sue the drawer, or if he be a customer, debit him with the amount of the bill.⁵

5. The indorser of a bill writes to the drawer promising to "retire" it, and accordingly takes it up before maturity. The bill is not discharged.⁶

NOTE.—The House of Lords has held that the drawer or indorser of a bill who pays it is a quasi-surety for the acceptor, and that the analogy is sufficiently close to entitle him to the benefit of any securities deposited by the acceptor with the holder, and retained by the holder at the time of the dishonour of the bill.⁷ Suppose

¹ *Callow v. Lawrence* (1814), 3 M. & S. 95; *Hubbard v. Jackson* (1827), 4 Bing. 390; Cf. Art. 119, n.; *Elsoworth v. Brewer* (1831), 28 Massachus. R. 315.

² Cf. *Williams v. James* (1850), 15 Q. B. at 505, Patteson, J.

³ See Art. 130; *sed contra* *Daniel*, § 1240; *Gardner v. Maynard* (1863), 89 Massachus. R. 456.

⁴ *McKinnon v. Armstrong* (1877), 2 App. Cas. at 539, H. L.

⁵ *Pollard v. Ogden* (1853), 2 E. & B. 459.

⁶ *Elsam v. Denny* (1854), 15 C. B. 87; see at 94 as to the meaning of "retire," but see a different construction put on the term, *Ex parte Reed* (1872), 14 L. R. Eq. at 593.

⁷ *Duncan Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1, H. L.

the drawer or indorser after payment again indorses the bill away. Payment, Would the indorsee be entitled to the benefit of the securities? by whom. This raises a serious difficulty which was not adverted to in the case.

Explanation 3.—Subject to Expl. 1, when a bill is paid wholly or in part by the drawer or by an indorser, and the holder retains possession of the bill, he holds it as trustee for such drawer or indorser as regards the amount received.¹

Exception.—When the acceptor of a bill becomes bankrupt, any payment made by the drawer or an indorser to the holder must be deducted from the amount for which the holder is entitled to prove against the acceptor's estate.²

NOTE.—The right of the holder to retain the bill when he has been paid by the drawer or an indorser depends on the arrangement between them.³ In France and other countries where the civil law is followed, payment by the drawer or an indorser discharges the bill, the rule being *debitorem ignarum seu etiam invitum solvendo liberare possumus*.

Art. 235. Payment in order to operate as a discharge of the bill must be made at or after the maturity thereof.⁴ Payment, at what time.

Explanation.—Payment by the drawee or acceptor previous to maturity operates as a mere purchase of the bill, and subject to Art. 238, he may, if the

¹ *Jones v. Broadhurst* (1850), 9 C. B. at 183; *Cook v. Lister* (1863), 32 L. J. C. P. at 127, Willes, J.; *Thornton v. Maynard* (1875), 10 L. R. C. P. 695; Cf. Art. 141, as to effect of this, if holder sues.

² *Ex parte Taylor* (1857), 26 L. J. Bank. 58; *Ex parte Mazoudoff* (1868), 6 L. R. Eq. 582.

³ *Jones v. Broadhurst* (1850), 9 C. B. at 183; Cf. *Woodward v. Pell* (1868), 4 L. R. Q. B. 55, as to a lien for costs, and Art. 296; and *Duncan Fox & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. at 17, 18.

⁴ *Burbridge v. Mannors* (1812), 3 Camp. at 124; *Beaumont v. Greathead* (1846), 2 C. B. 494 (after maturity); French Code, Arts. 144—146.

Payment, form of the bill permit, re-issue and further ne-
at what gotiate it.¹
time.

ILLUSTRATIONS.

1. Accepted bill payable three months after date. A month before it matures the holder indorses it for value to the acceptor. The next day the acceptor indorses it to D. D. can sue all parties to the bill.²

2. An accepted bill payable three months after date is held by C. A month before it matures the acceptor pays C., but C. retains the bill. The next day C. indorses it to D., who takes it for value and without notice of the payment. D. can sue the acceptor.³

3. The acceptor of a bill settles with the drawer before the bill matures. It turns out that the bill was outstanding in the hands of a third party. The acceptor must pay the holder, but can recover the amount from the drawer as money paid to his use.⁴

NOTE.—Premature payment or any other premature discharge is of course valid *inter partes*.

Payment,
to whom.

Art. 236. Payment in order to operate as a discharge of the bill must be made to the holder or to some person authorized to receive payment on his behalf.⁵

Exception 1.—Payment to the *de facto* holder who holds a bill wrongfully operates as a discharge if it be made in good faith and without notice.⁶

ILLUSTRATIONS.

1. A bill is payable to "John Smith or order." Another person of the same name gets the bill and presents it. The acceptor pays

¹ *Morley v. Culverwell* (1840), 7 M. & W. 174; see at 182, Parke, B.; *Attenborough v. Mackenzie* (1856), 25 L. J. Ex. 244; Cf. Art. 130.

² *Id.*; Cf. Art. 130.

³ Cf. *Dod v. Edwards* (1827), 2 C. & P. 602, premature release; French Code, Art. 144; *Cripps v. Davis* (1843), 12 M. & W. 159; *Ingham v. Primrose* (1859), 7 C. B. N. S. 82.

⁴ *Hawley v. Beverley* (1843), 6 M. & Gr. 221.

⁵ Cf. *Leftley v. Mills* (1791), 4 T. R. at 175; *Walker v. Macdonald* (1818), 2 Exch. at 532; *Nouguier*, § 889; *Pothier*, No. 164—167.

⁶ Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 579, Ex. Ch.; Art. 101; and see *Jones v. Fort* (1829), 9 B. & C. at 768; *Gray v. Johnston* (1868), 3 L. R. H. L. at 14; *Pothier*, No. 168, 169.

him. The bill is not discharged. The acceptor is still liable to Payment, the real John Smith. Art. 81. to whom.

2. A bill indorsed in blank is stolen. The thief presents it to the acceptor at maturity and obtains payment. If the acceptor pays *bonâ fide* he is discharged.¹

NOTE.—See Arts. 125—128, determining who is the *de facto* holder, Art. 144, as to lost bills, and Art. 29 as to bills drawn in a set. Arts. 141—143 show that the acceptor must pay unless the holder is shewn to hold the bill wrongfully. Art. 94 shows that the payor may set up the *jus tertii* and decline to pay a wrongful holder. But there is no decision to shew when he must set up the *jus tertii*. It is conceived that the same test of *bona fides* would be applied to the payor that is applied to an indorsee. See Art. 86, n. Payor and indorsee alike part with value and get the bill. *Holder's identity*. Under some continental codes when a bill is payable specially and the holder is a stranger he is bound to give some proof of identity.² In England it is conceived that possession is *primâ facie* evidence of identity,³ and that if the payor doubts the identity of the person presenting or the genuineness of the instrument he must pay or refuse to pay at his own risk. There is a dictum by Maule, J.,⁴ that in such case the payor would be allowed a reasonable time to make inquiry, but having regard to the duties of the holder this seems very questionable.

Exception 2.—Banker paying as drawee a genuine cheque which is held under a forged indorsement. Art. 263.

NOTE.—German Exchange Law, Art. 36, extends this protection to all payors, and Indian Draft Code, Arts. 86—88, proposes to do the same. French Code, Art. 145, provides that payment at maturity made “without opposition” discharges the payor. Art. 164 of the Netherlands Code is to the same effect.

Art. 237. When payment of a bill is made by mistake to a person who is not entitled to receive payment, and who cannot give a discharge,⁵ the Recovery by payor of money paid by mistake.

¹ *Smith v. Sheppard* (1776), cited *Chitty*, 10th ed. p. 180, n. ; Cf. *Roberts v. Tucker* (1851), 16 Q. B. at 576, Parke, B.

² *Nouguier*, § 897.

³ Cf. *Bulkeley v. Butler* (1824), 2 B. & C. at 441, Bayley, J.

⁴ *Roberts v. Tucker* (1851), 16 Q. B. at 578.

⁵ Art. 236, as to who can give discharge.

Recovery by payor of money paid by mistake. money so paid may be recovered back by the payor as follows :—

- (1.) The payor of a forged, altered, or cancelled bill, who has been led to pay it by the negligence of his correspondent or customer, and has not himself been guilty of negligence, can recover the money so paid from such correspondent or customer.

ILLUSTRATIONS.

1. A. draws a cheque on his bankers for 50*l.*, carelessly leaving a blank space before the words and figures “fifty.” The holder fills it up as a cheque for 150*l.*, and obtains payment. The banker can charge A. with the amount so paid.¹

2. A. draws in the ordinary way a cheque for 50*l.* It is altered to 150*l.* The alteration is not apparent. A.’s banker pays it. He can only charge A. with 50*l.*²

3. A. draws a bill on B., and indorses it in blank. Subsequently, intending to cancel it, he tears it into four pieces, and throws the pieces away. C. picks up the pieces, pastes them together, and presents the bill to B. and obtains payment. If the marks of cancellation are apparent, B. cannot recover the money so paid from A.³ *Aliter* if the marks be not apparent.⁴

4. A bill held under a forged indorsement is presented to B. for acceptance. B. accepts it payable at his bankers. The bankers pay it. They cannot charge B. with the amount.⁵

- (2.) A banker who, as drawee, pays a genuine cheque held under a forged or unauthorized indorsement, can recover the money so paid

¹ *Young v. Grote* (1827), 4 Bing. 253, as explained by *Arnold v. Cheque Bank* (1876), 1 L. R. C. P. D. at 586; *Halifax Union v. Wheelwright* (1875), 10 L. R. Ex. 183; Cf. *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. H. L. 107; Arts. 23, 52.

² *Hall v. Fuller* (1826), 5 B. & C. 750.

³ *Scholey v. Ramsbottom* (1810), 2 Camp. 485; Cf. Art. 138.

⁴ Cf. *Ingham v. Primrose* (1859), 7 C. B. N. S. 82.

⁵ *Robarts v. Tucker* (1851), 16 Q. B. 560, Ex. Ch.

from the drawer or debit him with it in account.¹ Cf. Art. 263.

- (3.) The payor can recover the money paid from the person who received it when such person did not act *bonâ fide* in demanding payment of the bill.²
- (4.) Subject to the provisions of the Crossed Cheques Act, 1876 as to a collecting banker in the case of a crossed cheque,³ the payor can recover the money paid from the person who received it when such person acted *bonâ fide* in demanding payment of the bill, provided
- (a) that the payor was not guilty of negligence in making the payment, and (probably)
 - (b) that the position of the party receiving payment has not altered before the discovery of the mistake and notification thereof.

ILLUSTRATIONS.

1. A cheque is presented and paid. Directly after the payment the bankers discover that the drawer's account was overdrawn. They cannot recover the money so paid from the holder of the cheque.⁴

2. A bill purporting to be drawn by A. on B., is paid by B. Subsequently B. discovers that A.'s signature was a forgery. B. cannot recover the money from the holder to whom he paid it.⁵

3. C., the holder of a bill purporting to be accepted payable at a bank, indorses it to D. for collection. D. obtains payment, and hands the money over to C. A week after the payment the bank

¹ 16 & 17 Vict. c. 59, § 19.

² *Martin v. Morgan* (1819), 3 Moore, 635; Cf. Arts. 81 and 94; *Kendal v. Wood* (1871), 6 L. R. Ex. 243.

³ See Art. 274, *post*, p. 241.

⁴ Cf. *Chambers v. Miller* (1862), 32 L. J. C. P. 39.

⁵ *Price v. Neal* (1762), 3 Burr. 1355; Cf. Art. 212.

Recovery
by payor
of money
paid by
mistake.

discovers that the acceptance was a forgery. The bank cannot recover the money from C.¹

4. A bill, purporting to bear the indorsement of C., is held by F. It is dishonoured. X. pays it *suprà protest* for C.'s honour. The same day he discovers that C.'s indorsement was a forgery, and gives notice to F. X. can (perhaps) recover the money from F.²

5. C., the indorser of a bill, pays D., the holder, in ignorance that he has been discharged by D.'s omission to present it for payment. A week after he discovers this fact. C. can recover the money he paid from D.³

6. C. is the holder of a bill purporting to be accepted by B., payable at his bankers. The bankers pay the bill. Next day they discover that the acceptance was a forgery, and give notice to C. They cannot recover the money from C.⁴

7. A bill held by C., and purporting to be accepted by B., is presented to B. for payment. B. inspects and pays it. Subsequently he discovers that his signature was forged. He cannot recover the money from C.⁵

8. A genuine bill fraudulently altered in amount from 10*l.* to 100*l.* is subsequently accepted and paid. Four months afterwards the acceptor discovers the fraud and gives immediate notice to the holder he paid. He can (probably) recover the money.⁶

NOTE.—The reasons given for the decisions are very conflicting. Illustrations 2, 3, and 6, might well be supported on the ground that the payor is bound to recognize the signature of his own correspondent or customer (cf. Art. 212), this being matter peculiarly within his own knowledge; but apart from this, it seems on principle that a person presenting a bill for payment ought to warrant its genuineness and his right to receive payment, just as a transferor by delivery warrants genuineness and his right to transfer

¹ *Smith v. Mercer* (1815), 6 Taunt. 76.

² *Wilkinson v. Johnston* (1824), 3 B. & C. 428; but Cf. *Phillips v. Im Thurn* (1866), 1 L. R. C. P. 463.

³ *Milnes v. Duncan* (1827), 6 B. & C. 671; Cf. *Kelly v. Solari* (1841), 9 M. & W. at 69.

⁴ *Cocks v. Masterman* (1829), 9 B. & C. 982.

⁵ *Mather v. Maidstone* (1856), 18 C. B. 273 at 295.

⁶ *White v. Cent. Nat. Bank* (1876), 64 New York R. 316; Cf. *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261, and Arts. 248, 249.

(Art. 226). There are dicta to this effect,¹ but the point must be regarded as very questionable : Cf. Art. 236, n.

Recovery
by payor
of money
paid by
mistake.

Coincidence of Right and Liability.

Art. 238. A bill which has been negotiated is discharged, when the acceptor either is or becomes the holder thereof at or after maturity. Cf. Art. 235.

Acceptor
the holder
at
maturity.

Exception.—Acceptor holding a bill as administrator of the late holder.²

ILLUSTRATIONS.

1. A bill payable after date and accepted by three joint acceptors is held by C. C., before the bill matures, indorses it to B., one of the acceptors. If B. retains the bill till its maturity, it is discharged.³

2. B. is the maker of a note payable on demand. The holder dies, having appointed B. his executor. The note is discharged.⁴

3. The maker of a note payable on demand dies, having appointed C., the holder, his executor. The note is not discharged unless C. have assets available for the payment of it, and he can validly indorse it away at any time before he has such assets.⁵

4. B., X., and Y. make a joint and several note payable on demand to B.'s wife, in consideration of money lent by her as administratrix to B. X. and Y. sign as sureties for B. On B.'s death, his widow can sue X. and Y.⁶

NOTE.—As to “discharge” see Art. 230. The general rule is

¹ Cf. *Wilkinson v. Johnston* (1824), 3 B. & C. at 437; *Woods v. Thiedeman* (1862), 1 H. & C. at 495, Bramwell, B.; *sed contra East India Co. v. Tritton* (1824), 3 B. & C. at 291.

² *Williams on Executors*, 7th ed. p. 1313.

³ *Harmer v. Steele* (1849), 4 Exch. 1 Ex. Ch.; Cf. *Mainwaring v. Newman* (1800), 2 B. & P. 120 (two firms with common partner); *Neale v. Turton* (1827), 4 Bing. 149.

⁴ *Freakley v. For* (1829); 9 B. & C. 130, but the executors must account for the amount of the note as assets; *Williams on Executors*, 7th ed., pp. 1310—1315.

⁵ *Low v. Peskett* (1855), 15 C. B. 500.

⁶ *Richards v. Richards* (1831), 2 B. & Ad. 447; Cf. *Beecham v. Smith* (1858), E. B. & F. 442.

Acceptor that a present right and liability united in the same person, cancel
the holder each other. This mode of discharge is called in the civil law *con-*
at fusio, and is recognized in all countries whose law is founded on
maturity. civil law.¹

Waiver or Cancellation.

Waiver or
cancellation
by
holder.

Art. 239. A bill is discharged when the holder of it at or after maturity absolutely and unconditionally renounces his rights against the acceptor.²

The liabilities of any party to a bill may in like manner be released by the holder verbally and without consideration either before or after its maturity;³ but such release if given before maturity is inoperative against a subsequent holder for value who takes the bill before maturity and without notice.⁴

ILLUSTRATIONS.

1. The holder of a bill at maturity tells the acceptor that he renounces all claims against him. The bill is discharged.⁵

2. The holder of a bill before it matures tells the first indorser that he renounces all claim against him. The first and subsequent indorsers are (probably) discharged as regards such holder. The drawer and acceptor are not.⁶

3. The holder of a bill verbally agrees with the drawer that he will not exercise his right of recourse against him if a certain event takes place. The event happens. The drawer is not discharged,

¹ As to France, see *Nouguier*, §§ 1061—1065. *Qu.* if German Exchange Law, Art. 10, is a departure from the rule.

² *Dingwall v. Dunster* (1779), 1 Dougl. 247, *Id.* Mansfield.

³ *Foster v. Dauber* (1851), 6 Exch. 839 at 851, 852, Parke, B.; *Cf. Cook v. Lister* (1863), 32 L. J. C. P. at 126; *Abrey v. Cruz* (1869), 5 L. R. C. P. at 44, Willes, J.; *Pothier*, No. 175—183.

⁴ *Cf. Ingham v. Primrose* (1859), 7 C. B. N. S. 82, and Art. 235.

⁵ *Whatley v. Tricker* (1807), 1 Camp. 35, and *Foster v. Dauber*, *suprà*. See Art. 245.

⁶ *Pothier*, No. 182, 183; *Nouguier*, §§ 1048, 1049; *Cf. Delatorre v. Barclay* (1814), 1 Stark. 7. See Art. 245.

for this is merely an oral agreement to vary the effect of a bill, and not an absolute waiver of the drawer's liability.¹

4. The holder of a bill strikes out the acceptor's signature, intending to cancel it. This is a waiver of the acceptance, and discharges the bill.² *Aliter* if the cancellation be not apparent, and the bill be negotiated to a holder for value before maturity.³

5. B. accepts the first part of a foreign bill drawn in a set of two, and sends it, as directed, to a bank to be held at the disposition of the holder of the second. The drawer, who is the holder of the second part, failing to discount it, cancels it, and directs the bank to deliver up the first to B. B. gets the first part and cancels his acceptance. B. is discharged, and if the drawer subsequently issue a fresh second part, the holder cannot sue B.⁴

NOTE.—This mode of discharge, called in France "*Remise volontaire*," is recognised in all countries where the civil law is followed. Compare Art. 168, clause 4, and Art. 200, clause 7, as to waiver of the holder's duties, and Art. 119, n., as to striking out indorsements.

Art. 240. The cancellation of a signature is *prima facie* evidence that the liabilities of the party whose signature is cancelled have been discharged, but the cancellation may be shown to have been made by mistake, and is then inoperative.⁵

Payment for Honour Suprà Protest.

Art. 241. A bill which has been protested or noted for non-payment may be paid *suprà protest* for

¹ *Abrey v. Cruix* (1869), 5 L. R. C. P. 37.

² Cf. *Secreting v. Hulse* (1829), 9 B. & C. at 369; *Yglesias v. River Plate Bank* (1877), 3 L. R. C. P. D. 60.

³ *Ingham v. Primrose* (1859), 7 C. B. N. S. 82, and Art. 138.

⁴ *Ralli v. Dennistoun* (1851), 6 Exch. 483.

⁵ *Raper v. Birkbeck* (1812), 15 East, 17, acceptance cancelled by referee in case of need. *Wilkinson v. Johnson* (1824), 3 B. & C. 428, indorsements cancelled by payor for honour. *Novelli v. Rossi* (1831), 2 B. & Ad. 757, acceptance cancelled by bank where payable, *Warwick v. Rogers* (1842), 5 M. & Gr. 340 and 373; acceptance cancelled by bank where payable, *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Ca. 325, P. C., note cancelled by maker's banker.

Payment *suprà protest.* the honour of any party liable thereon.¹ It then ceases to be negotiable.²

Payment *suprà protest* must be duly attested by a notarial act of honour.³

NOTE.—Promissory notes are sometimes, though not often, paid *suprà protest*. The “act of honour” is founded on a declaration by the payor or his agent stating for whose honour he desires to pay. Payment *suprà protest* is known in France as payment “par intervention,” which expresses its nature.

Who may pay bill *suprà protest.* Art. 242. A bill may be paid *suprà protest* by the acceptor *suprà protest*, or referee in case of need,⁴ or (perhaps) by any other person, whether a party liable on the bill or not.⁵

NOTE.—By French Code, Art. 159, payment *suprà protest* may be made by “tout intervenant,” but this is interpreted to mean any person other than a party already liable on the bill.⁶ The limitation seems reasonable, having regard to the rights acquired by the payor. It is clear the acceptor *suprà protest* can only pay for the honour of the party for whose honour he accepted. French Code, Art. 159, and German Exchange Law, Art. 64, provide that if two or more persons offer to pay *suprà protest*, he whose payment will liberate most parties must be preferred.

Holder's obligation to receive payment for honour. Art. 243. A holder who refuses to receive payment *suprà protest* (perhaps) loses his right of recourse against the parties who would have been discharged thereby.⁷

NOTE.—An object for refusing might be the prospect of gain on the re-exchange.

¹ *Geralopulo v. Wieler* (1851), 20 L. J. C. P. 105; Cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; *Brook's Notary*, 4 ed., 108—110.

² *Ex parte Swan* (1868), 6 L. R. Eq. 344; *Nouguier*, § 1026; Cf. *Deacon v. Stodhart* (1841), 2 M. & Gr. at 320.

³ Cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; *Brook's Notary*, 4 ed., 108—110; for forms, see pp. 226—228.

⁴ Cf. 6 & 7 Will. 4, c. 58; German Exchange Law, Art. 62.

⁵ *Byles*, p. 270. No decision in England.

⁶ *Nouguier*, §§ 1004—1008.

⁷ *Nouguier*, § 1009; German Exchange Law, Art. 62. No English decision.

Art. 244. The payor *suprà protest* on payment of the amount of the bill and expenses, is entitled to receive from the holder the bill itself and the protest.¹

Rights and duties of payor for honour.

The payor *suprà protest* by such payment is invested with both the rights and the duties of the holder as regards the party for whose honour he pays, and all prior parties liable on the bill to such party; but all parties subsequent to him for whose honour payment is made are discharged.²

ILLUSTRATION.

A dishonoured bill is held by the fifth indorser. If X. pays it *suprà protest* for the honour of the acceptor, he acquires a right to re-imbursement against the acceptor alone; if he pays for the honour of the first indorser, he can sue the first indorser and the drawer (provided they have due notice) and the acceptor, but the second and subsequent indorsers are discharged.

NOTE.—*Pothier*, Nos. 113, 114, points out that the right of the payor is not, properly speaking, a right of action on the bill, but a right arising out of the quasi contract *negotiorum gestorum*, hence the payor cannot again negotiate the bill, or transfer his rights.

Discharge of Surety by Dealings with Principal.

Art. 245. Where the relationship of principal and surety exists between the parties to a bill, or the parties to a bill transaction, and the holder, having notice thereof, engages to give time to or voluntarily

Discharge of surety by certain dealings with principal.

¹ German Exchange Law, Art. 63; Cf. Art. 206. No English decision, but such is the practice.

² *Goodall v. Polhill* (1845), 14 L. J. C. P. 146, duties, *e.g.*, notice of dishonour; *Ex parte Swan* (1868), 6 L. R. Eq. 344, rights; Cf. *Ex parte Wyld* (1860), 2 De G. F. & J. 642; French Code, Art. 159; German Exchange Law, Art. 63.

Discharge
of surety
by certain
dealings
with prin-
cipal.

discharges the principal, the surety or sureties are thereby discharged.¹

Explanation.—*Primâ facie* the acceptor of a bill is the principal debtor, and the drawer and indorsers are as regards him, sureties, and the drawer of a bill is the principal as regards the indorsers, and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order;² but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal.³

ILLUSTRATIONS.

1. The holder of a bill takes from the acceptor in lieu of payment a new bill payable at a future day, to which the drawer and indorsers are not parties. This discharges the drawer and indorsers.⁴

2. The holder of a bill for 200*l.* takes from the acceptor 100*l.* in full discharge of his claim, but expressly reserves his rights against the drawer and indorsers (thereby preserving their rights against the acceptor). The drawer and indorsers are not discharged.⁵

3. The holder of a bill for 100*l.* accepts a composition of 10*s.* in the pound from the acceptor under Bankruptcy Act, 1869, §§ 125, 126. The drawer and indorsers are only discharged to the extent of the sum received by the holder, for the acceptor is discharged by operation of law.⁶

¹ *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142, affirmed (1874), 7 L. R. H. L. 348; Cf. Netherlands Code, Arts. 198, 199.

² Cf. *Cook v. Lister* (1863), 32 L. J. C. P. at 127, per Willes, J.

³ *Ewin v. Lancaster* (1865), 6 B. & S. at 577; *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142; affirmed (1874), 7 L. R. H. L. 348.

⁴ Cf. *Gould v. Robson* (1807), 8 East, 576, and *Petty v. Cooke* (1871), 6 L. R. Q. B. at 794.

⁵ *Muir v. Crawford* (1875), 2 L. R. Sc. Ap. 456, H. L.

⁶ *Re Jacobs* (1875), 10 L. R. Ch. 211; Cf. *Provincial Bank of Ireland v. Dunne* (1878), 2 Ir. L. R. Q. B. D. 21; *Yglesias v. River Plate Bank* (1877), 3 L. R. C. P. D. 60; Netherlands Code, Arts. 198, 199.

4. The holder of a dishonoured bill enters into a binding agreement to give time to the first indorser. This discharges the subsequent indorsers, but not the drawer or acceptor.¹

Discharge of surety by certain dealings with principal.

5. The holder of a bill at the request of the acceptor delays presenting it for payment. The drawer is discharged.²

6. A bill is accepted by six joint acceptors. Three accept as sureties for the other three, who accept for the accommodation of the first indorser. The holder, knowing the facts, makes an arrangement with the first indorser. The acceptors are discharged.³

7. A bill is accepted for the accommodation of the drawer and C. the indorser. The holder agrees to give time to C. the indorser. The acceptor is discharged.⁴

8. C. is the holder of a joint and several note made by B. and X. X. signed merely to accommodate B., and as surety for him. C., knowing this, agrees for consideration to give time to B. X. is thereby discharged.⁵

9. C. is the holder of a joint and several note made by B. and X. C. knows that X. signed as surety to accommodate B. B. pays C. It turns out afterwards that this payment was a fraudulent preference. C. refunds the money to B.'s trustees. X. is not discharged by B.'s payment.⁶

10. A bill is accepted for the accommodation of the drawer. After it is due the holder is informed of this and then agrees to give time to the drawer. The acceptor is discharged.⁷

11. A bill drawn by A. and accepted by B. is discounted with C. C. subsequently discovers that the bill was drawn and accepted for the accommodation of X., who is not a party to the bill, but who is to provide for it. C. then enters into an agreement to give time to X. This discharges the acceptor of the bill.⁸

¹ *Claridge v. Dalton* (1815), 4 M. & S. at 232; *Hall v. Cole* (1836), 4 A. & E. 577.

² *Latham v. Chartered Bank* (1873), 17 L. R. Eq. 205.

³ *Ex parte Webster* (1847), De Gex, 414.

⁴ *Bailey v. Edwards* (1864), 4 B. & S. 761.

⁵ *Greenough v. McClelland* (1860), 30 L. J. Q. B. 15 Ex. Ch.

⁶ *Petty v. Cooke* (1871), 6 L. R. Q. B. 790.

⁷ *Ewin v. Lancaster* (1865), 6 B. & S. 571; Cf. *Torrance v. Bank of British America* (1873), 5 L. R. P. C. at 252.

⁸ *Oriental Corp. v. Overend* (1871), 7 L. R. Ch. 142; affirmed (1874), 7 L. R. H. L. 348.

Discharge
of surety
by certain
dealings
with prin-
cipal.

NOTE.—As regards the particular dealings with a principal which discharge the surety there is no difference between an ordinary surety and a surety on a bill, so it would be useless to multiply illustrations.¹ See Art. 297 as to the right of a surety on a bill, who is compelled to pay it, to the benefit of securities held by the creditor he pays.

Alterations.

Issue
defined.

Art. 246. "Issue" means the first delivery of a bill to a person who takes it as a holder for value and thereby acquires the right to enforce payment thereof.²

ILLUSTRATIONS.

1. A. draws a bill on B., payable to his own order. B. accepts the bill for value and returns it to A. The bill is issued.³

2. A. draws, B. accepts, and C. indorses a bill payable to D. or order for D.'s accommodation. The bill while in D.'s hands is not issued, but if D. indorses and discounts it with E. it is issued.⁴

Material
alteration
defined.

Art. 247. An alteration is material which in any way alters the operation of a bill and the liabilities of the parties as originally fixed thereby, whether the change be prejudicial or not.⁵

ILLUSTRATIONS.

1. The following are material :—

A particular consideration is substituted for the words value received;⁶ or the date of a bill payable at a fixed period after date

¹ See *e.g.*, *Davis v. Stainbank* (1854), 6 De G. M. & G. 679, what amounts to giving time; *Pearl v. Deacon* (1857), 1 De G. & J. 461; distress by landlord on goods pledged as security for note.

² Cf. *Ex parte Bignold* (1836), 1 Deac. at 735.

³ *Cardwell v. Martin* (1808), 9 East, 190; *Bathe v. Taylor* (1812), 15 East, 412; Cf. *Kennerly v. Nash* (1816), 1 Stark. 452.

⁴ *Downes v. Richardson* (1822), 5 B. & Ald. 674; Cf. *Turleton v. Shingler* (1849), 7 C. B. 812.

⁵ *Gardner v. Walsh* (1855), 5 E. & B. 83 at 89. Cf. *Vance v. Lowther* (1876), 1 L. R. Ex. D. 176, materiality is a question of law.

⁶ *Knill v. Williams* (1809), 10 East, 431, stamp; Cf. *Wright v. Inshaw* (1842), 1 D. N. S. 802.

is altered, and the time of payment thereby postponed¹ or accelerated;² or a bill payable three months after date is converted into a bill payable three months after sight;³ or the date of a cheque or bill payable on demand is altered;⁴ or the crossing of a cheque is altered;⁵ or the sum payable is altered, *e.g.* from 105*l.* to 100*l.*;⁶ or the specified rate of interest is altered, *e.g.* from 3 per cent. to 2½ per cent.;⁷ or a bill payable "with lawful interest" is altered by adding the words "interest at six per cent.;"⁸ or a particular rate of exchange is indorsed on a bill which does not authorise this to be done;⁹ or a joint note is converted into a joint and several note;¹⁰ or a new maker is added to a joint and several note;¹¹ or the name of a maker of a joint and several note is cut off,¹² or intentionally erased;¹³ or the place of payment is altered, *e.g.* a bill is accepted payable at X. & Co.'s and Y. & Co. is substituted for X. & Co.;¹⁴ or a place of payment is added *without* the acceptor's consent.¹⁵

Material alteration defined.

2. The following are immaterial:—

A bill payable to C. or bearer is converted into a bill payable to C. or order;¹⁶ or an indorsement in blank is converted into a special indorsement;¹⁷ or the words "on demand" are added to a note in

¹ *Outen v. Luntly* (1815), 4 Camp. 179; *Hirschman v. Budd* (1873), 8 L. R. Ex. 171; *Société Générale v. Metropolitan Bank* (1873), 21 W. R. 335.

² *Master v. Miller* (1793), 2 H. Bl. 130, Ex. Ch.; *Walton v. Hastings* (1815), 4 Camp. 223, stamp.

³ *Long v. Moore* (1799), 3 Esp. 155, n.

⁴ *Vance v. Lowther* (1876), 1 Ex. D. 176.

⁵ 39 & 40 Vict. c. 89, § 6. See *post*, p. 239.

⁶ Cf. *Hamelin v. Bruck* (1846), 9 Q. B. 306.

⁷ *Sutton v. Toomer* (1827), 7 B. & C. 416.

⁸ *Warrington v. Early* (1853), 23 L. J. Q. B. 47.

⁹ *Hirschfield v. Smith* (1866), 1 L. R. C. P. 340. Cf. Art. 13.

¹⁰ *Perring v.hone* (1826), 4 Bing. 28.

¹¹ *Gardner v. Walsh* (1855), 5 E. & B. 83. Cf. *Clerk v. Blackstock* (1816), Holt, N. P. 474.

¹² Cf. *Mason v. Bradley* (1843), 11 M. & W. 590; *Benedict v. Cowden* (1872), 49 New York R. 396, cutting off condition written at bottom of note.

¹³ *Nicholson v. Revill* (1836), 4 A. & E. 675.

¹⁴ *Tidmarsh v. Grover* (1813), 1 M. & S. 735.

¹⁵ *Calvert v. Baker* (1838), 4 M. & W. 417; *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; Cf. *Hanbury v. Lovett* (1868), L. T. N. S. 366. *Qu.* if the acceptor consent. *Walter v. Cubley* (1833), 2 Cr. & M. 151, and cf. *Mason v. Bradley* (1843), 11 M. & W. at 594; but see *Gibbs v. Mather* (1832), 2 Cr. & J. at 262; *Saul v. Jones* (1858), 28 L. J. Q. B. 37, which show that the position of the drawer and indorsers is altered.

¹⁶ *Atwood v. Griffin* (1826), 2 C. & P. 368.

¹⁷ See Art. 118.

Material alteration defined. which no time of payment is expressed ;¹ or a bill addressed to B. and X. under the style of "B. X. and Co." is accepted by them as "B. and X.," and the address is afterwards altered to "B. and X." to make it correspond with the acceptance ;² or an erroneous "due date" is added to a bill.³

Effect of alteration on bill. Art. 248. A material alteration, by whomsoever made,⁴ avoids and discharges a bill.⁵

ILLUSTRATION.

A bill held by C. is materially altered, *e.g.*, by inserting a place of payment without the acceptor's consent. C. afterwards indorses the bill to D., who takes it for value and without notice of the alteration. D. in like manner indorses it to E. E. can maintain no action on this bill. His only remedy is to sue D. in respect of the consideration he gave for the bill, and D. will have a like remedy against C.⁶

Exception 1.—A bill altered before issue⁷ is valid as regards all parties who assent to such alteration.⁸

Exception 2.—A bill issued out of the United Kingdom, which has been altered after issue, is valid as regards all parties who assent to such alteration, provided the alteration were made before any negotiation of the bill within the United Kingdom.⁹

¹ *Aldous v. Cornwall* (1868), 3 L. R. Q. B. 573. Cf. Art. 18.

² *Farquhar v. Southey* (1826), M. & M. 14. Cf. Art. 37.

³ *Fanshawe v. Peat* (1857), 26 L. J. Ex. 314.

⁴ *Davidson v. Cooper* (1843), 11 M. & W. at 799, affirmed (1844) 13 M. & W. 343.

⁵ *Master v. Miller* (1793), 2 H. Bl. 130, Ex. Ch., 1 Smith L. C., 7th ed., 871, and notes.

⁶ *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261.

⁷ Cf. Art. 248, issue defined.

⁸ *Webber v. Maddocks* (1811), 3 Camp. 1 ; *Kennerley v. Nash* (1816), 1 Stark. 452 ; *Douces v. Richardson* (1822), 5 B. & Ald. 674 ; *Sherrington v. Jermyn* (1828), 3 C. & P. 374 ; *Wright v. Inshaw* (1842), 1 D. N. S. 802, and Art. 246.

⁹ *Hamelin v. Bruck* (1846), 9 Q. B. 306, read with Stamp Act, 1870, 33 & 34 Vict. c. 97, § 51 ; Cf. *Langton v. Lazarus* (1839), 5 M. & W. 629.

Exception 3.—A bill may at any time be altered for the purpose of correcting a mistake,¹ and bringing the instrument into accordance with the intention of the parties at the time of issue.² Effect of alteration on bill.

ILLUSTRATION.

A bill payable after date is wrongly dated,³ or a note intended to be negotiable is made payable to C. simply, the words "or order" being omitted.⁴ The mistake may be corrected after the bill has been negotiated.

NOTE.—The Court in the exercise of its equitable jurisdiction has power to rectify a bill which does not express the intention of the parties,⁵ just as it can do so in the case of any other contract. As regards parties who do not assent to an alteration the bill is avoided by virtue of the common law rule, for a bill in this respect is on the same footing as any other written contract. As regards parties who assent to the alteration the bill is, subject to certain exceptions above stated, avoided by virtue of the stamp laws. The alteration creates a new bill which requires a new stamp. In cases where an adhesive stamp may be used, the bill as altered may of course be re-stamped. This is in effect a new bill on the old paper. In America the severity of the English rule is relaxed, and it is generally held that an alteration by a stranger, or as it is called an "act of spoliation," does not avoid a bill.⁶

Art. 249. The holder of a bill which has been avoided by a material alteration cannot sue on the consideration in respect of which it was negotiated to him.⁷ Effect of alteration on consideration.

¹ Cf. *Knill v. Williams* (1809), 10 East, 431; *Ex parte White* (1833), 2 Deac. & Ch. at 358, 359; *Hamelin v. Bruck* (1846), 9 Q. B. at 310; *London & Prov. Bank v. Roberts* (1874), 22 W. R. 402.

² *Bradley v. Bardsley* (1845), 14 M. & W. 873.

³ *Brutt v. Pickard* (1824), K. & M. 37.

⁴ *Kershaw v. Cox* (1800), 3 Esp. 246; *Byrom v. Thompson* (1839), 11 A. & E. 31; *Cariss v. Tattersall* (1841), 2 M. & Gr. 890; Cf. Art. 107.

⁵ *Druiff v. Parker* (1868), 5 L. R. Eq. 131.

⁶ *Parsons v. ii.*, p. 574; Cf. *U. S. v. Spalding* (1822), 2 Mason at 482, Story, J.; *Hunt v. Gray* (1871), 10 Amer. R. 232; *Dinsmore v. Duncan* (1874), 57 New York R. at 581.

⁷ *Alderson v. Langdale* (1832), 3 B. & Ad. 660. Cf. Art 146.

Effect of
alteration
on con-
sideration.

Exception 1.—If the bill was negotiated to him after the alteration was made, and he was not privy to the alteration, he may sue on the consideration.¹

Exception 2.—If the bill was altered while in his custody or under his control, he can still recover provided (a) that he did not intend to commit a fraud by the alteration,² and (b) that the party sued would not have had any remedy over on the bill, if it had not been altered.

ILLUSTRATIONS.

1. A. sells goods to B., and draws a bill on him for the price payable to his own order. B. accepts. The bill is subsequently altered while in A.'s possession. A. can sue B. for the price of the goods though no action could be brought on the bill.³

2. A. sells goods to C., and draws a bill on B. for the price and indorses the bill to C. B. accepts. The bill is altered while in C.'s hands. C. cannot sue A. for the price of the goods, for the alteration has deprived A. of his remedy on the bill against B.⁴

Onus
probandi
as to
alteration.

Art. 250. Where a bill appears to have been altered, or there are marks of erasure on it, the party seeking to enforce the instrument is bound to give evidence to show that it is not avoided thereby.⁵ Cf. Art. 138.

¹ *Burchfield v. Moore* (1854), 23 L. J. Q. B. 261; Cf. *Cundy v. Marriott* (1831), 1 B. & Ad. 696.

² *Parsons, v. ii.* p. 572; *Hunt v. Gray* (1871), 10 Amer. R. 232.

³ *Atkinson v. Hawdon* (1835), 2 A. & E. 628; Cf. *Sutton v. Toomer* (1827), 7 B. & C. 416, payee against maker of note.

⁴ *Alderson v. Langdale* (1832), 3 B. & Ad. 660; see by way of analogy the effect at common law of the loss of a bill, *Crove v. Clary* (1854), 9 Exch. 604.

⁵ *Knight v. Clements* (1838), 8 A. & E. 215; *Clifford v. Parker* (1841), 2 M. & Gr. 909; Cf. *Tatum v. Catomore* (1851), 16 Q. B. at 746; see e.g., *Cariss v. Tattersall* (1841), 2 M. & Gr. 890, as to what evidence suffices.

Renewal.

Art. 251. When a bill is given in renewal of a former bill, and the holder retains such former bill, the renewal, in the absence of special agreement,¹ operates merely as a conditional payment thereof. If the renewal bill be paid in due course or otherwise discharged, the original bill is likewise discharged ;² but if the renewal bill be dishonoured, then, subject to Art. 245, the liabilities of the parties to the original bill revive and they may be sued thereon.³

NOTE.—Renewing a bill or note operates as an extension of the time for paying it.⁴ Hence, if a bill be renewed without the assent of all parties liable thereon as sureties, the parties so liable are discharged. See Art. 245. When there is an agreement to renew, the application for renewal must be made within a reasonable time of the maturity of the original bill, but it need not be made before its maturity.⁵ When the holder of a renewed bill could not have maintained an action on the original bill because there was no consideration for it,⁶ or the consideration was illegal,⁷ or because he was privy to some fraud connected therewith,⁸ he cannot sue on the renewed bill.⁹

Bill as Payment.—A bill given in renewal of another bill operates in the same way as a bill given in respect of any other debt. The ordinary effect of giving a bill is that the remedy for the debt is

¹ Cf. *Lewis v. Lyster* (1835), 2 C. M. & R. 704; *Lumley v. Musgrave* (1837), 4 Bing. N. C. at 15.

² *Dillon v. Rimmer* (1822), 1 Bing. 100; Cf. *Soward v. Palmer* (1818), 2 Moore, 274; *Lumley v. Hudson* (1837), 4 Bing. N. C. 15.

³ *Ex parte Barclay* (1802), 7 Ves. jr. 597; *Norris v. Aylett* (1809), 2 Camp. 329; Cf. *Kendrick v. Lomax* (1832), 2 Cr. & J. 405; *Sloman v. Cox* (1834), 1 C. M. & R. at 472; *Fenton v. Blackwood* (1874), 5 L. R. P. C. 167.

⁴ *Jagger Iron Co. v. Walker* (1879), 76 New York R. 521.

⁵ *Maillard v. Page* (1870), 5 L. R. Ex. 312; Cf. *Innes v. Munro* (1847), 1 Exch. 473; *Torrance v. Bank of British America* (1874), 5 L. R. P. C. 246, as to construction of agreements to renew.

⁶ *Southall v. Rigg* (1851), 11 C. B. 481.

⁷ *Chapman v. Black* (1819), 2 B. & Ald. 588; *Hay v. Ayling* (1851), 16 Q. B. 423.

⁸ *Lee v. Zaugury* (1817), 8 Taunt. 114.

⁹ See, however, two apparent but not real exceptions, *Mather v. Maidstone* (1855), 18 C. B. 273; *Flight v. Reed* (1863), 1 H. & C. 703.

Effect of renewal. suspended until the dishonour of the bill. The bill operates as conditional payment, the condition being that the debt revives if the bill cannot be realised. It is immaterial whether the bill be payable on demand or *in futuro*.¹ In France in the absence of special agreement the renewal of a bill extinguishes the original bill by *novatio*.²

¹ *Currie v. Misa* (1875), 10 L. R. Ex. at 163, 164, Ex. Ch.

² *Nouguier*, §§ 1032—1042.

CHAPTER VIII.

LIMITATIONS.

Statute of Limitations.

Art. 252. Subject to Arts. 191 and 253, no action on a bill can be maintained against any party thereto after the expiration of six years from the time when a cause of action first accrued to the *then* holder against such party.¹

Limita-
tion, how
computed
against the
several
parties.

ILLUSTRATION.

C. is the holder of a dishonoured bill. Three years after the dishonour he indorses the bill to D. D. must sue the acceptor within the next three years, though he (presumably) has six years within which he may sue C.

Explanation 1.—As regards the acceptor, time begins to run from the maturity of the bill, unless—

- (1.) Presentment for payment is necessary in order to charge the acceptor, in which case time (probably) runs from the date of such presentment;² or
- (2.) The bill is accepted after its maturity, in

¹ Cf. Jac. 1. c. 16; 3 & 4 Anne, c. 8, s. 4. *Whitehead v. Walker* (1842), 9 M. & W. 506; *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

² Cf. Art. 172.

Limita-
tion, how
computed
against the
several
parties.

which case time (probably) runs from the date of acceptance.¹

ILLUSTRATIONS.

1. Bill payable *in futuro*, e.g. three months after date or sight. Time runs in favour of the acceptor from the day the bill is payable, not from the day the acceptance is given.²

2. B. in 1840 gives a blank acceptance to C. In 1850 it is filled up as a bill payable three months after date, and negotiated to *bond fide* holder. Time runs in favour of B. from the day the bill was payable.³

3. Note payable on demand (with or without interest), and issued on the day it bears date. Time runs in favour of the maker from the date of the note, and not from the date of demand.⁴

4. Note payable on demand, dated January 1, is not issued till July 1. Time runs in favour of the maker from July 1, the day of issue.⁵

5. Note payable three months after demand. Time runs in favour of the maker from the day the bill is payable.⁶

Explanation 2.—As regards the drawer or endorser, time (generally) begins to run from the day when notice of dishonour is received.⁷

ILLUSTRATIONS.

1. Bill payable ninety days after sight is dishonoured by non-acceptance. As regards the drawer time runs against the holder from the dishonour by non-acceptance and notice thereof. If the bill is presented for payment and again dishonoured, no fresh cause of action arises.⁸

2. A. draws a bill on B. C. indorses it for A.'s accommodation.

¹ Cf. Art. 34.

² *Holmes v. Kerrison* (1810), 2 Taunt. 323; Cf. *Fryer v. Rowe* (1852), 1 C. B. 437. See Art. 20, computation of time of payment.

³ *Montague v. Perkins* (1853), 22 L. J. C. P. 187. Cf. Art. 23.

⁴ *Norton v. Ellam* (1837), 2 M. & W. 461; Cf. *Jackson v. Ogg* (1859), 10 M. & W. 400; *Wheeler v. Warner* (1872), 47 New York R. 519.

⁵ *Savage v. Aldren* (1817), 2 Stark. 232; Cf. *Richards v. Richards* (1831), 1 B. & Ad. 447; *Watkins v. Figg* (1863), 11 W. R. 258.

⁶ *Thorpe v. Combes* (1826), 8 D. & R. 347; Cf. *Way v. Bassett* (1845), 5 Har. & W. 55. *Brown v. Rutherford* (1880), 14 Ch. D. 687 C. A.

⁷ Cf. *Castrigue v. Bernabo* (1844), 6 Q. B. 498, and Art. 189.

⁸ *Whitehead v. Walker* (1842), 9 M. & W. 506.

The bill is dishonoured, and five years after the dishonour, C., as indorser, is obliged to pay the holder. Two years later (*i.e.*, seven years after the dishonour), C. sues A. on the bill. The action is barred. *Aliter* if C. sued A. on the implied contract of indemnity.¹

Limitation, how computed against the several parties.

3. C. is the indorser of a bill or note payable on demand. Time (presumably) does not begin to run in favour of C. until demand has been made and notice given.

NOTE.—In England it is held that the holder's right of action against the drawer or an indorser is not complete until notice of dishonour is received;² when then does the cause of action arise when the notice is delayed or lost in the post? (Cf. Art. 193.) Perhaps from the time when it ought to have been received. In America the balance of authority favours the view that the cause of action is complete when notice of dishonour is sent.³ In cases where notice of dishonour is unnecessary (Art. 200) probably the cause of action arises on dishonour.

Explanation 3.—When an action is brought against a party to a bill, to enforce an obligation collateral to the bill, though arising out of the bill transaction, the nature of the particular transaction determines the period from which time begins to run.

ILLUSTRATIONS.

1. B. accepts a bill to accommodate the drawer. It is dishonoured, and two years afterwards B. is compelled to pay the holder. B. sues the drawer on the implied agreement to indemnify. Time runs from the date B. was compelled to pay, and not from the maturity of the bill.⁴

2. B. authorises A., an agent abroad, to draw upon him for the price of goods to be shipped to B. B. dishonours a draft so drawn, and A. is compelled to take it up. A. can sue B. on an implied

¹ *Webster v. Kirk* (1852), 17 Q. B. 944; Cf. *Woodruff v. Moore* (1850), 8 Barb. 171, New York.

² *Castrigue v. Bernabo* (1844), 6 Q. B. 498.

³ *Daniel*, § 1212; *Shel v. Brett* (1823), 18 Massachus. R. 401.

⁴ *Reynolds v. Doyle* (1840), 1 M. & Gr. 753; *Angrove v. Tippet* (1865), 11 L. T. N. S. 708; but cf. *Coppin v. Gray* (1842), 11 L. J. Ch. 105, as to a premature payment; see *Davies v. Humphries* (1846), 6 M. & W. 153, contribution among co-makers.

Limita-
tion, how
computed
against the
several
parties.

contract to indemnify. Time runs from the date when A. was compelled to pay.¹

3. A., intending to lend C. 50*l.*, draws a cheque in C.'s favour for that sum. A. sues C. to recover the loan. Time runs from the date when the cheque was cashed.²

NOTE.—See Art. 230, n., distinguishing a right of action on bill from a right of action which a party to a bill may have arising out of the bill transaction but independent of the instrument. *Foreign laws and conflict of laws.*—In France the period of limitations is five years, and the time it seems begins to run against acceptor, drawer, and indorsers from the day of protest. By German Exchange Law, Art. 77, the limitation as regards the acceptor is three years, starting from the maturity of the bill; but as regards the drawer or indorsers it is three months, starting from the day of protest, if the drawer or indorser live and the bill is payable in Europe. Where laws conflict as to time of limitation and the limitation, as in England, merely bars the remedy, the *lex fori* governs.⁴ *Aliter* probably when lapse of time operates as discharge. Cf. Art. 231.

Statute,
how de-
feated.

Art. 253. Any circumstance which postpones or defeats the operation of the statute of limitations in the case of an ordinary contract postpones or defeats it in like manner in the case of a bill.

No indorsement or memorandum of any payment written or made upon a bill by or on behalf of the party to whom such payment is made is sufficient to defeat the operation of the statute.⁵

ILLUSTRATIONS.

1. The holder of an accepted bill dies intestate before its maturity. The statute does not begin to run until an administrator is appointed.⁶

2. The holder of a bill at the time of its dishonour is a minor.

¹ *Huntley v. Sanderson* (1833), 1 Cr. & M. 467.

² *Garden v. Bruce* (1868), 3 L. R. C. P. 300.

³ French Code, Art. 189, *Nouguier*, § 1605.

⁴ *Don v. Lippman* (1837), 5 Cl. & F. 1. H. L.

⁵ 9 Geo. 4, c. 14, s. 3.

⁶ *Murray v. East India Co.* (1821), 5 B. & Ald. 204; see conversely *Mawell v. Tuohill* (1878), 1 Ir. L. R. Ch. D. 250, death of acceptor intestate.

or a married woman or a lunatic. The statute does not begin to run against such holder until the disability ceases.¹ Statute,
how de-
feated.

3. Note payable on demand with interest. Four years after its issue the holder sues the maker for interest and recovers. Three years later (*i.e.*, seven years after issue of note) the holder sues the maker on the note. The action is barred.² *Aliter* if the payment of interest had been voluntary.

4. Note payable three months after demand. Interest is paid on it as appears from indorsements on the back of the note. This is evidence of a demand, and the statute begins to run from the first payment of interest.³

5. An acknowledgment in writing signed by the party sought to be charged defeats the operation of the statute, *e.g.*, the maker of a note twenty years after its maturity signs his name on the back and adds the date. The holder can sue the maker within six years after this acknowledgment.⁴

NOTE.—When the statute begins to run nothing stops it. It is clear then that if a dishonoured bill be indorsed to an infant the time still runs on.⁵ On the other hand, if the holder of a bill at the time of dishonour be an infant, and he subsequently indorse it while still an infant to an adult, it is conceived that the statute runs from the indorsement. It seems that an acknowledgment to the holder enures for the benefit of a subsequent holder.⁶ By s. 4 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97) part payment by one co-contractor or co-debtor does not defeat the operation of the statute in favour of the other or others.

¹ Cf. 21 Jac. 1, c. 16; *Scarpelini v. Atcheson* (1845), 7 Q. B. 864.

² *Morgan v. Rowlands* (1872), 7 L. R. Q. B. 493; see also *Harding v. Edgecumbe* (1859), 28 L. J. Ex. 313, payment by agent.

³ *Brown v. Rutherford* (1880), 14 Ch. D. 687, C. A.

⁴ *Bourdin v. Greenwood* (1872), 13 L. R. Eq. 281. See as to acknowledgments, *Re River Steamer Co.* (1871), 6 L. R. Ch. at 828, *Mellish, L. J.*; *Chasemore v. Turner* (1875), 10 L. R. Q. B. 500, Ex. Ch.

⁵ *Rhodes v. Smethurst* (1840), 6 M. & W. 351, Ex. Ch.

⁶ *Byles*, 12 ed. p. 358; Cf. *Cripps v. Davis* (1842), 12 M. & W. 159.

CHAPTER IX.

PROVISIONS PECULIAR TO CHEQUES.

[EXPLANATORY HEAD-NOTE.—The term “bill” as used in the articles of this digest includes cheques as well as ordinary bills of exchange; and subject to the provisions of this chapter, the provisions of the digest relating to bills of exchange payable on demand apply equally to cheques. See *Introd.*, p. iv. and head-note to Chap. I.]

General Provisions.

Cheque
defined.

Art. 254. A cheque is a bill of exchange¹ drawn by a customer on his banker² payable on demand.³

NOTE.—See cheques compared with and distinguished from ordinary bills of exchange by Parke, B.,⁴ Erle, J., and Byles, J.,⁵ Palles, C. B.,⁶ and the Supreme Court of the United States.⁷ All cheques are bills of exchange, but all bills of exchange are not cheques, therefore an authority to draw cheques does not necessarily include an authority to draw bills. See Art. 74. Apart from statute the distinctions between cheques and ordinary bills of exchange arise from the relationship of banker and customer necessarily subsisting between the drawer and drawee of a cheque. See further the notes to Arts. 5, 11, 16, 67, 79, 105, 133, 160, 162. A cheque is intended for prompt presentment, while a note payable on demand is deemed to be a continuing security.⁸ In France, cheques are regulated by the “*Loi du 23 Mai, 1865*,” as modified by the “*Loi du 19 Fevrier, 1874*.” See further Nouguiers’s treatise “*Des Cheques*.” The French Law defines a cheque as

¹ Cf. *Eyre v. Waller* (1860), 29 L. J. Ex. 246; *Hopkinson v. Forster* (1874), 19 L. R. Eq. 74; 33 & 34 Vict. c. 97, § 48.

² Cf. 23 & 24 Vict. c. 111, § 19; and 39 & 40 Vict. c. 81, § 3.

³ *Id.*, and *Forster v. Mackreth* (1867), 2 L. R. Ex. 163.

⁴ *Ramchurn v. Luchmechund* (1854), 9 Moore P. C. at 69.

⁵ *Keene v. Beard* (1860), 8 C. B. N. S. at 380, 381, as modified by *Hopkinson v. Forster* (1874), 19 L. R. Eq. at 76, Jessel, M. R.

⁶ *Lynn v. Bell* (1876), 10 Ir. R. C. L. at 490.

⁷ *Merchants Bank v. State Bank* (1870), 10 Wallace at 647.

⁸ *Brooks v. Mitchell* (1841), 9 M. & W. at 18, Parke, B.; *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. at 579, *Ld. Cairns*.

“L'écrit qui sous la forme d'un mandat de paiement sert au Cheque tireur à effectuer le retrait à son profit ou au profit d'un tiers ^{defined.} de tout ou partie des fonds portés au crédit de son compte et disponibles.”

Art. 255. “It shall be lawful for any person to ^{Sum payable.} draw upon his banker, who shall *bonâ fide* hold money to or for his use, any draft or order for the payment to the bearer, or to order on demand of any sum of money less than twenty shillings.”¹

NOTE.—By an Act of 1808 negotiable bills, notes, and cheques for less than 20s., were prohibited, see Art. 11; but by the Act of 1860, cited above, the restriction is removed as regards cheques.

Art. 256. A cheque is not intended for accept- ^{Acceptance of cheque.} ^{ance,} but for prompt presentment and payment.²

NOTE.—At common law there is no objection to the acceptance of a cheque if the holder likes to take it in lieu of payment, but the Bank Charter Acts would in most cases render this illegal. See Art. 69. *Marked Cheques.*—As between banker and banker marking a cheque may perhaps amount to a binding representation that it will be paid,³ but it is clearly not an acceptance which the holder could take advantage of. See Art. 32. As to certified cheques in the United States, see *Daniel*, §§ 1601—1611.

Art. 257. A cheque is deemed to have been pre- ^{Reasonable time for presentment.} ^{sented} within a reasonable time when presented according to the following rules:—

- (1.) If the person who receives a cheque and the banker on whom it is drawn are in the same place the cheque must, in the absence of special circumstances,⁴ be presented for payment on the day after it is received.⁵

¹ 23 & 24 Vict. c. 111, s. 19, of Art. 11 n.

² Cf. *Ranchurn v. Lachmechund* (1854), 9 Moore P. C. at 69, Parke, B.

³ Cf. *Robson v. Bennet* (1810), 2 Taunt. 388; and see *Pollard v. Bank of England* (1871), 6 L. R. Q. B. 623; *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 351, 352.

⁴ Cf. Arts. 169, 201, excuses for delay, and *Firth v. Brooks* (1861), 4 L. T. N. S. 467.

⁵ *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061.

Reason-
able time
for pre-
sentment.

- (2.) If the person who receives a cheque and the banker on whom it is drawn are in different places, the cheque must, in the absence of special circumstances,¹ be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present it or forward it on the day after he receives it.²

Explanation.—In computing time non-business days must be excluded.³

Exception.—When a cheque is crossed, any delay caused by presenting the cheque pursuant to the crossing is (probably) excused.⁴

ILLUSTRATIONS.

1. C., in London, receives a cheque drawn on a London banker on Monday. On Tuesday, instead of presenting it himself, he pays it in to his bankers who present on Wednesday. C. has not presented the cheque within a reasonable time. *Aliter*, it seems, if the cheque was crossed when C. received it.⁵

2. C., on Monday, in London, receives a cheque drawn on a Jersey bank. On Tuesday C. pays it in to a London bank. The London bank on the same day forward it by post direct to the Jersey bank requesting payment. C. has duly presented the cheque.⁶

NOTE.—The result of the cases seems to be this. A party who receives a cheque has a clear day for presenting or forwarding it. If, instead of presenting it himself, he forwards it to someone else to present, the question is, was he acting reasonably in so doing. A principal of course is responsible to third parties for the act of

¹ Cf. Arts. 169, 201, excuses for delay, and *Firth v. Brooks* (1861), 4 L. T. N. S. 467.

² *Hare v. Henty* (1861), 30 L. J. C. P. 302; *Prideaux v. Criddle* (1869), 4 L. R. Q. B. 455.

³ Cf. 34 & 35 Vict. c. 17, and Arts. 20, 195, 196.

⁴ Cf. *Alexander v. Burchfield* (1842), 7 M. & Gr. at 1067. Since this case the crossing of cheques has received legislative sanction. See Art. 265.

⁵ *Id.*

⁶ *Heywood v. Pickering* (1874), 9 L. R. Q. B. 428.

his agents; e. g., if a person forwards a cheque to an agent, and the agent instead of presenting it himself unreasonably forwards it to another agent the loss as regards third parties falls on the principal, though he may have a remedy over against his agent. The question whether a cheque has been presented within a reasonable time may arise between drawer and holder, or between indorser and indorsee, or between transferor by delivery and transferee,¹ or between customer and banker.² In each case it must be determined as between the particular parties. See a different standard of reasonable time as between vendor and vendee where the vendor of goods was paid by the cheque of the vendee's agent.³

Reasonable time for presentment.

Art. 258. The drawer of a cheque is not discharged by the holder's omission to present it for payment within a reasonable time as defined by Art. 257, unless the drawer has suffered actual damage through the delay.⁴

Presentment to charge drawer.

ILLUSTRATIONS.

1. A. draws a cheque in favour of C. in 1850. It is presented for payment in 1852, and dishonoured. No reason for the delay is shown. A. is not discharged. The holder can sue him.⁵

2. A cheque drawn by A. on a London bank is handed to the payee in London on Monday. On Wednesday morning the bank on which it is drawn stops payment, A. having at that time funds there sufficient to meet it. The cheque is presented on Wednesday afternoon. A. is discharged.⁶

3. A cheque is presented for payment twelve days after issue. Six days after the issue of the cheque the drawer withdrew his balance from the bank on which it was drawn, and the next day the bank failed. The drawer is not discharged.⁷

¹ See e.g., *Moule v. Brown* (1838), 4 Bing. N. C. 266.

² See e.g., *Hare v. Henty* (1861), 30 L. J. C. P. 302.

³ *Hopkins v. Ware* (1869), 4 L. R. Ex. 268.

⁴ *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061; *Robinson v. Hawksford* (1846), 9 Q. B. 52; *Laws v. Rand* (1857), 27 L. J. C. P. 76; *Bailey v. Bodenham* (1864), 33 L. J. C. P. 253; *Heywood v. Pickering* (1874), 9 L. R. Q. B. at 432.

⁵ *Laws v. Rand* (1857), 27 L. J. C. P. 76.

⁶ *Alexander v. Burchfield* (1842), 7 M. & Gr. 1061.

⁷ *Kinyon v. Stanton* (1878), 28 Amer. R. 601.

Present-
ment to
charge
drawer.

Explanation.—When a cheque is not presented within a reasonable time of its issue, and the drawer sustains actual damage through the delay, it is (probably) no excuse that such delay was caused by the *bonâ fide* negotiation of the cheque through different hands.¹

NOTE.—In *Laws v. Rand* (1857),² it is suggested that the omission to present a cheque within six years of its issue would in any case discharge the drawer. No case against an indorser has arisen in England. It is conceived that he would be discharged by the omission to present within a reasonable time, irrespective of actual damage.³

Notice of Dishonour.—When a cheque has been presented and dishonoured, notice of dishonour must be given, as in the case of a bill. There are dicta to this effect;⁴ and the rule is clear, although there is no express decision in point; for (1) a cheque is a bill of exchange, see Art. 254; and (2) there are several decided cases where the question has been what circumstances will excuse notice in the case of a cheque. These cases imply and assume the necessity for notice.⁵

When
deemed
overdue.

Art. 259. It is uncertain when a cheque not known to have been dishonoured is to be deemed overdue for the purpose of affecting the holder with equities of which he had no notice at the time the cheque was negotiated to him.⁶

ILLUSTRATION.

A. is induced by fraud to draw a cheque in favour of C. Six days after its date C. indorses the cheque to D. D. has not taken an overdue cheque, therefore if he gave value and had not notice of the fraud he has a good title.⁷

¹ *Byles*, 10th ed., p. 21; *Daniel*, § 1595; see Art. 254 n.; but Cf. *Bailey v. Bodenham* (1864), 33 L. J. C. P. 253, where, however, the point was not argued and the drawer was held to be discharged on another ground.

² 27 L. J. C. P. 76; Cf. *Pott v. Clegg* (1847), 16 M. & W. 321, for a reason.

³ Cf. *Smith v. Jones* (1838), 20 Wend. 192, New York.

⁴ Cf. *Rickford v. Rudge* (1810), 2 Camp. at 538.

⁵ See e.g., *Kemble v. Mills* (1840), 1 M. & Gr. 755; *Carver v. Duckworth* (1869), 4 L. R. Ex. 313; *Wirth v. Austin* (1875), 10 L. R. C. P. 689.

⁶ *Serrel v. Derbyshire Ry. Co.* (1850), 9 C. B. 811 at 828, 829; Cf. *Boehm v. Stirling* (1797), 7 T. R. 423; *Ex p. Hughes* (1880), 43 L. T. 577.

⁷ *Rothschild v. Corney* (1829), 9 B. & C. 388.

NOTE.—Cf. Arts. 133, 134, as to overdue bills of exchange, When Art. 282 as to overdue note on demand, and see Art. 138. In deemed America a cheque indorsed five months after date has been held to overdue. have been negotiated when overdue.¹

Art. 260. (1.) In the absence of special contract, Banker's the relations between a banker and his customer are duty to those of debtor and creditor; and in addition the honour customer is entitled to draw cheques on the banker cheques. to the extent of the sum for which he is a creditor.²

(2.) Where a cheque is presented for payment and dishonoured, and the banker has in his hands at the time funds to the credit of his customer sufficient to meet it, the banker is liable to his customer in damages,³ unless the requisite funds were paid in so short a time before the dishonour of the cheque that the banker could not with the exercise of reasonable diligence have ascertained the state of accounts between them.⁴

Explanation 1.—In the absence of special directions from the customer, it is the duty of the banker to pay the customer's cheques in the order in which they are presented.⁵

Explanation 2.—As regards banks having several branches, where a customer has an account at one

¹ *First Nat. Bank v. Needham* (1870), 29 Iowa R. 249; Cf. *Himmelman v. Hotelling* (1870), 6 Amer. R. 600.

² Cf. *Pott v. Clegg* (1847), 16 M. & W. 321; *Foley v. Hill* (1848), 2 H. L. Ca. 28. See too *Re Hallett's Estate* (1880), 13 Ch. D. at 727, 728, C. A.

³ *Murzetti v. Williams* (1830), 1 B. & Ad. 415; *Whitaker v. Bank of England* (1835), 1 C. M. & R. 744; *Gray v. Johnston* (1863), 3 L. R. H. L. 1, see at 14, per Ld. Westbury; but see per Ld. Cairns and *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903; Cf. *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 351, Ex. Ch. As to the measure of damages, see Art. 209.

⁴ *Whitaker v. Bank of England* (1835), 1 C. M. & R. at 749—750, Parke, B.; Cf. *Bransby v. East London Bank* (1866), 14 L. T. N. S. 403.

⁵ *Kilsby v. Williams* (1822), 5 B. & Ald. 819; Cf. *Boyd v. Emerson* (1834), 2 A. & E. 184, at 202.

Banker's
duty to
honour
cheques.

branch, the other branches at which he has no account are not bound to honour his cheques;¹ but where a customer has accounts at two or more branches the bank is entitled to combine such accounts against him.²

NOTE.—The combined accounts must be kept in the same right; *e. g.*, a personal and a trust account cannot be combined. See the whole status of branch banks in regard to bills discussed by the Privy Council.³ *Duty as to Bills.*—When a customer accepts a bill payable at his bankers it is an authority to the banker to pay it;⁴ but *qu.* if the banker is bound to do so in the absence of special arrangement?⁵ In the case of a cheque he is protected against the consequences of a forged indorsement (Art. 263), in the case of a bill he is not (Art. 81). In the absence of special agreement a banker is clearly under no obligation to accept his customers' bills (Art. 208), nor it seems is he bound to pay a bill, other than a cheque, drawn on him by a customer (Art. 208), and a post-dated cheque known to be such is an ordinary bill of exchange payable after date.⁶ *Overdraft.*—In the absence of special agreement, express or implied, founded on consideration, a banker is of course under no obligation to let a customer overdraw.⁷

Death or
bank-
ruptcy of
drawer.

Art. 261. The duty and authority of a banker to pay a cheque drawn on him by a customer are determined by—

- (1.) Countermmand of payment.⁸
- (2.) Notice of the customer's death.⁹
- (3.) Notice that the customer has committed an act of bankruptcy available for adjudication.¹⁰

¹ *Woodland v. Fear* (1857), 7 E. & B. 519.

² *Garnet v. M'Ewan* (1872), 8 L. R. Ex. 10.

³ *Prince v. Oriental Bank* (1878), 3 L. R. Ap. Ca. 325.

⁴ *Kymer v. Laurie* (1849), 18 L. J. Q. B. 218.

⁵ *Cf. Roberts v. Tucker* (1851), 16 Q. B. at 579.

⁶ *Forster v. Mackreth* (1867), 2 L. R. Ex. 163; *Cf. Emmanuel v. Roberts* (1868), 9 B. & S. 121, and Art. 57.

⁷ *Cumming v. Shand* (1832), 29 L. J. Ex. at 132.

⁸ *Cf. Cohen v. Hule* (1878), 3 Q. B. D. 371.

⁹ *Rogerson v. Ladbroke* (1822), 1 Bing. N. C. 93; *Cf. Tate v. Hilbert* (1793),

² *Vea, jr.* at 118.

¹⁰ *Vernon v. Hankey* (1787), 2 T. R. 113; *Ex parte Sharp* (1844), 3 M. D. & D. 490. See Art. 101.

- (4.) The fact that the customer has been adjudicated bankrupt irrespective of notice.¹ Death or bankruptcy of drawer.

NOTE.—When a firm of two partners has a banking account, and one dies, the authority of the surviving partner to draw cheques on the firm account is not determined.² As to paying a draft contrary to instructions, see *Twibell v. London Suburban Bank*.³

Art. 262. A cheque given by the drawer in contemplation of death must be presented for payment by the donee before the drawer's death in order to entitle the donee to receive the amount out of the drawer's estate as a *donatio mortis causâ*. Gift in contemplation of death.

ILLUSTRATIONS.

1. A. draws a cheque in favour of C., and in contemplation of death hands it to him as a gift. After A.'s death it is presented and payment refused. C. cannot claim for the amount against A.'s estate.⁴

2. A., in contemplation of death, draws a cheque and gives it to C. After A.'s death C. presents the cheque, and the bankers, in ignorance of A.'s death, pay it. C. can (probably) retain the money as against A.'s representatives.⁵

3. A., in contemplation of death, draws a cheque and gives it to C. Before A.'s death C. presents it for payment. The bankers refuse to pay it, because doubtful of A.'s signature. A. dies, and payment is subsequently refused on that ground. C., the donee, is entitled to receive the amount out of A.'s estate.⁶

4. A., in contemplation of death, draws a cheque and gives it to C. Before A.'s death C. negotiates the cheque for value. The holder can claim for the amount against A.'s estate.⁷

¹ See Art. 101 and Bankruptcy Act, 1869, ss. 15 (3), 94, 95.

² *Backhouse v. Charlton* (1878), 8 Ch. D. 444; see too *Usher v. Dauncery* (1814), 4 Camp. 97.

³ *Twibell v. London Suburban Bank*, W. N. 1869, p. 127.

⁴ *Hewitt v. Kaye* (1868), 6 L. R. Eq. 198; *Beak v. Beak* (1872), 13 L. R. Eq. 489; Cf. *Jones v. Locke* (1865), 1 L. R. Ch. 25.

⁵ Cf. *Tate v. Hilbert* (1793), 2 Ves. jr. at 118. The bankers are justified in paying, see Art. 261.

⁶ *Bromley v. Bruntton* (1868), 6 L. R. Eq. 275.

⁷ *Rolls v. Pearce* (1877), 5 L. R. Ch. D. 730.

Gift in
contem-
plation of
death.

NOTE.—Cf. Art. 105. The position of the donee of a cheque is this: he cannot sue the drawer's executors on the instrument, because he is not a holder for value (Art. 91), and the banker's authority to pay is revoked by notice of the drawer's death (Art. 261). A cheque given for value, it is conceived, is on the same footing as an ordinary bill of exchange. But, assuming that as between drawer and payee, it is a mere authority to receive the amount, still an authority coupled with an interest is not revoked by death.¹

Payment
of cheque
held under
forged in-
dorsement.

Art. 263. A banker who, as drawee,² pays in good faith³ a genuine⁴ cheque which is held under a forged or unauthorised indorsement, is deemed to have paid the same in due course.⁵

ILLUSTRATIONS.

1. A. draws a cheque payable to C. or order. It is stolen, and C.'s indorsement is forged by the thief. The bankers on whom it is drawn pay it. They can debit A. with the amount so paid.⁶

2. A., who is indebted to C., draws a cheque payable to C., or order, and gives it to X., who is C.'s agent. X., who has no authority to indorse cheques, indorses it "per proc." in C.'s name, obtains payment and makes away with the money. The loss falls on C. He has no remedy against A. or the bankers.⁷

3. A., who is indebted to C., draws a cheque payable to C., or order. The cheque is stolen while still in A.'s possession. C.'s indorsement is forged, and the cheque is paid. The loss falls on A., he has not paid C.;⁸ but if A. can find the person who presented the cheque for payment he can recover the money from him.⁹

NOTE.—The enactment reproduced in this Art. is inserted as a proviso in the Stamp Act of 1853 (16 & 17 Vict. c. 59). It has

¹ Cf. *Hatch v. Searles* (1854), 2 Sm. & G. at 151 and 155; see *passim*; *Snaith v. Mingay* (1813), 1 M. & S. at 95.

² Cf. *Ogden v. Benas* (1874), 9 L. R. C. P. 513; see *Halifax Union v. Wheelwright* (1875), 10 L. R. Ex. 183, person acting in a double capacity.

³ *Hare v. Copland* (1862), 13 Ir. C. L. R. at 433.

⁴ Cf. *Orr v. Union Bank* (1854), 1 Macq. H. L. Ca. 513.

⁵ 16 & 17 Vict. c. 59, § 19, explained by C. A. in *Charles v. Blackwell* (1877), 2 C. P. D. at 156.

⁶ *Id.*

⁷ *Charles v. Blackwell* (1877), 2 C. P. D. 151, C. A.

⁸ *Id.* at 157.

⁹ *Ogden v. Benas* (1874), 9 L. R. C. P. 513.

no apparent connection with s. 18, the section which precedes it. Payment of cheque held under forged indorsement.
Section 18 related to spoiled stamps, and is now repealed.
Section 19 is as follows:—

“XIX. Provided always, that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof.”

Inasmuch as the Act of 1853 related only to inland bills—for foreign bills were not subjected to stamp duty until the following year—it is conceived that the protection afforded by this section would not apply to the case of a demand draft drawn abroad on a banker in England.

As regards illustration 3, the proposition that the drawer can recover the money from the person who presented the cheque holds good as regards private individuals and uncrossed cheques; but a collecting banker who collects for a customer a crossed cheque on which the indorsement has been forged is now protected by the Crossed Cheques Act. See post Art. 274.

Art. 264. A cheque on payment becomes the property of the drawer,¹ but the banker who pays it is entitled to keep it as a voucher until his account with his customer is settled.² Property in paid cheque.

The Crossed Cheques Act, 1876.

(39 & 40 VICT. c. 81.)

Art. 265 (s. 3). In this Act—

“Cheque” means a draft or order on a banker payable to bearer or to order on demand, and includes a warrant for payment of dividend on stock sent by post by the Interpretation.

¹ *R. v. Watts* (1850), 2 Den. C. C. 15.

² Cf. *Charles v. Blackwell* (1877), 2 C. P. D. at 162, C. A.

Interpreta-
tion.

Governor and Company of the Bank of England or of Ireland, under the authority of any Act of Parliament for the time being in force :

“ Banker ” includes persons or a corporation or company acting as bankers.

NOTE.—In the first edition the provisions of the Crossed Cheques Act, 1876, were reproduced in a shorter form, but that hardly seemed safe ; and in the present edition the provisions of that Act which contain the whole law on the subject of crossed cheques are incorporated verbatim.

General
and special
crossings.

Art. 266 (s. 4). Where a cheque bears across its face an addition of the words “ and company,” or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, and either with or without the words “ *not negotiable*,” that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally.

Where a cheque bears across its face an addition of the name of a banker, either with or without the words “ *not negotiable*,” that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker.

Crossing
after issue.

Art. 267 (s. 5). Where a cheque is uncrossed, a lawful holder may cross it generally or specially.

Where a cheque is crossed generally, a lawful holder may cross it specially.

Where a cheque is crossed generally or specially, a lawful holder may add the words “ *not negotiable*.”

Where a cheque is crossed specially, the banker

to whom it is crossed may again cross it specially to another banker, his agent for collection. Crossing after issue.

NOTE.—Presumably a cheque may be crossed by the drawer, but the Act does not say so in terms, and as a rule the term holder does not include the drawer of a bill before issue.

Art. 268 (s. 6). A crossing authorised by this Act shall be deemed a material part of the cheque, and it shall not be lawful for any person to obliterate or, except as authorised by this Act, to add to or alter the crossing. Crossing material part of cheque.

NOTE.—In an unreported case it has been held that when the indorser of a cheque crosses it, and subsequently at the request of the indorsee, alters the crossing, the indorser cannot set up that the cheque is avoided by the alteration.

Art. 269 (s. 7). Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. Payment to banker only.

Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or to his agent for collection.

Art. 270 (s. 8). Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof. Cheque crossed specially more than once not to be paid.

Art. 271 (s. 9). Where the banker on whom a crossed cheque is drawn has in good faith and without negligence paid such cheque, if crossed generally to a banker, and if crossed specially to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque and (in case such cheque has come to the Protection of banker and drawer where cheque crossed specially.

Protection of banker and drawer where cheque crossed specially. hands of the payee) the drawer thereof shall respectively be entitled to the same rights, and be placed in the same position in all respects, as they would respectively have been entitled to and have been placed in if the amount of the cheque had been paid to and received by the true owner thereof.

Banker paying cheque contrary to provisions of Act to be liable to lawful owner. Art. 272 (s. 10). Any banker paying a cheque crossed generally otherwise than to a banker, or a cheque crossed specially otherwise than to the banker to whom the same shall be crossed, or his agent for collection being a banker, shall be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

NOTE.—There is no privity of contract between the holder of a cheque and the banker on whom it is drawn (Art. 210), therefore a banker incurs no liability to the *holder* by refusing to pay a crossed cheque. If he pay it in contravention of the directions of the crossing he is liable to the true owner for a breach of his statutory duty; and if he negligently or dishonestly pay it to a wrongful holder he may be liable to the true owner in an action of trover.¹

Relief of banker from responsibility in some cases. Art. 273 (s. 11). Where a cheque is presented for payment, which does not at the time of presentation appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, a banker paying the cheque, in good faith and without negligence, shall not be responsible or incur any liability, nor shall the payment be questioned, by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by

¹ Cf. *Smith v. Union Bank* (1875), 10 L. R. Q. B. at 296, and 1 Q. B. D. at 35, as modified by the present Act.

this Act, and of payment being made otherwise than to a banker or the banker to whom the cheque is or was crossed, or to his agent for collection being a banker (as the case may be).

Relief of banker from responsibility in some cases.

Art. 274 (s. 12). A person taking a cheque crossed generally or specially, bearing in either case the words "*not negotiable*," shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had.

Title of holder of cheque crossed specially.

But a banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.

ILLUSTRATIONS.

1. A cheque payable to bearer and crossed generally and with the words "*not negotiable*" is stolen. The thief gets C., a tradesman, to cash it for him. C. acts *bonâ fide* in doing so. C. pays the cheque into his banker's, who present it and obtain payment. The banker who pays and the banker who receives payment are protected, but C. is liable to refund the money to the true owner. Again, assuming the cheque to have been stopped, C. cannot sue the drawer.

2. A cheque is crossed in the ordinary way without the addition of the words "*not negotiable*." The indorsement of the payee is forged. A banker who collects the cheque for a customer is protected by the second clause of this section.¹

NOTE.—The words "*not negotiable*" in the Crossed Cheques Act mean merely "*not fully negotiable*." A cheque so crossed is in effect put on the same footing as an overdue bill (see Art. 134); no liability is imposed thereby on a banker who pays it without

¹ *Mathiessen v. London and County Bank* (1879), 5 C. P. D. 7.

Title of
holder of
cheque
crossed
specially.

negligence. A holder who has a good title can still transfer it and the transferee is entitled to receive payment, but where the title of the holder is defective a subsequent holder for value is deprived of the protection usually afforded to a *bonâ fide* holder for value without notice. It has been held that the second clause of s. 12 is not a mere proviso to the first clause, but a substantive enactment protecting the collecting banker in the case of all crossed cheques, whether they bear on their face the words "not negotiable" or not.¹ This is a beneficial, but decidedly forced construction.

¹ *Mathicssen v. London and County Bank* (1879), 5 C. P. D. 7.

CHAPTER X.

PROVISIONS PECULIAR TO PROMISSORY NOTES.

[EXPLANATORY HEAD-NOTE.—The term “bill” in contradistinction to “bill of exchange,” as used in the articles of this digest, includes *mutatis mutandis* promissory note as well as bill of exchange, the maker of a promissory note corresponding with the acceptor of a bill of exchange. See Intro., p. iv., and head-note to Chapter I. In this chapter are collected the provisions which apply exclusively to promissory notes.]

Art. 275. A promissory note is an unconditional ^{Note defined.} promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand or at a determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer.¹

NOTE.—See a promissory note compared with a bill of exchange by Lord Mansfield,² and Parke, B.,³ and cf. Art. 286 n. See also some points of difference between a bank note and an ordinary note referred to by Bramwell, B.⁴ *Foreign Law*.—The French law as to notes (billets à ordre), is contained in French Code de Commerce, Arts. 187, 188. Although the Code is silent on the point, it seems that notes payable to bearer (billets au porteur) are to some extent recognised, see *Nouguier*, §§ 1565—1578; German Exchange Law, Arts. 96—100, deals with notes.

¹ *Coleman v. Cooke* (1742), Willes, 393 at 396, 397; Cf. *Ferris v. Bona* (1821), 4 B. & Ald. 679.

² *Heylyn v. Adamson* (1758), 2 Burr. at 676.

³ *Gibb v. Mather* (1832), 2 Cr. & J. at 262—263, Ex. Ch.

⁴ *Litchfield Union v. Greene* (1857), 1 H. & N. at 889.

Form and Interpretation.

Necessary
parties.

Art. 276. There must be two parties to a promissory note in its origin, and they must be different persons, namely—

- (1.) The person who makes the promise, called the maker.
- (2.) The person in whose favour the promise is made, called the payee. Cf. Art. 2.

Explanation.—A writing in the form of a note payable to maker's order is not a note, but by indorsement it becomes one.¹

ILLUSTRATIONS.

1. B. makes a note payable to his own order, and indorses it in blank. This is a valid note payable to bearer.²

2. B. makes a note payable to his own order, and indorses it to C. This is a valid note payable to C. or order.³

3. B., C. and X. make a joint and several note payable to C. and X. or order. This is a valid note. C. and X. may sue B. on his several liability.⁴

4. B. & Co. make a note payable to C. & Co. or order. X. is a partner in both firms. C. & Co. cannot sue B. & Co. on this note. But if C. & Co. indorse the note, the indorsee could sue.⁵

Delivery
necessary.

Art. 277. A promissory note is inchoate and incomplete until delivery thereof be made to the payee.⁶

Note may
be in any
form of
words.

Art. 278. A promissory note may be in any form of words which comply with the requisitions of

¹ *Hooper v. Williams* (1848), 2 Exch. 13.

² *Id.*; *Masters v. Baretto* (1849), 8 C. B. 433.

³ *Gay v. Lander* (1848), 17 L. J. C. P. 286.

⁴ *Becchan v. Smith* (1858), E. B. & E. 442.

⁵ *Lindley*, 3rd ed., 219; Cf. *Neale v. Turton* (1827), 4 Bing. 149.

⁶ *Chapman v. Cottrell* (1865), 3 H. & C. 857; Cf. Arts. 53–55, as to delivery.

Art. 275,¹ and from which the intention to make a note appears.²

Note may be in any form of words.

ILLUSTRATIONS.

1. An I. O. U. containing a promise to pay may constitute a note.³

The following are invalid as notes :

2. "Borrowed of C. 100*l.* to account for on behalf of the X. Club at — months' notice, if required." (Signed) T. B.⁴

3. "I. O. U. 20*l.* for value received." (Signed) W. B.⁵

4. "Nine years after date I promise to pay C. 100*l.*, provided X. shall not return to England, or his death be certified in the mean time." (Signed) W. B.⁶

NOTE.—For further illustrations, see Arts. 2, 8, 9, 10, 12, 13, 14, 19, 20, 23, 58. The promise of the maker in a note corresponds with the order to the drawee in a bill of exchange accepted generally. It may be regarded as the same contract stated conversely, and the same considerations apply to both, see Art. 10. An instrument invalid as a negotiable promissory note may of course be effectual as an agreement,⁷ or an I. O. U. Subjoined is an ordinary form of note.

£100.

1, Duke Street, London,
January 1, 1870.

On demand I promise to pay to James Charles, or order,
one hundred pounds, for value received.

John Brown.

Art. 279. There may be two or more makers to a promissory note, and they may be liable thereon jointly, or jointly and severally, according to its tenour.⁸

Joint and several note.

¹ *Hooper v. Williams* (1848), 2 Exch. at 20. See English and American cases reviewed in *Currier v. Lockwood* (1873), 16 Amer. R. 40.

² *Sibtree v. Tripp* (1846), 15 M. & W. at 29; Cf. *Jackson v. Slipper* (1869), 19 L. T. N. S. 640.

³ *Brooks v. Elkins* (1836), 2 M. & W. 74.

⁴ *White v. North* (1849), 3 Exch. 689.

⁵ *Gould v. Coombes* (1845), 1 C. B. 543.

⁶ *Morgan v. Jones* (1830), 1 C. & J. 162.

⁷ Cf. *White v. North* (1849), 3 Exch. 689.

⁸ Cf. *Ex parte Honey* (1871), 7 L. R. Ch. 178.

ILLUSTRATIONS.

Joint and
several
note.

1. A note in the form "I promise," signed by several persons who are not partners, is their joint and several note.¹

2. A note in the form "We promise," signed by several persons, is their joint note only.²

3. B, X. and Y. are partners. B. makes a note in the form "I promise," signing "for X. and Y." T. B. This is the joint note of the firm, and not a several note by B.³

Explanation 1.—A partner as such cannot bind his co-partners severally, but by a joint and several note he may bind the firm jointly⁴ and himself severally.⁵

Explanation 2.—A maker cannot be added to a joint and several note after it has been issued.⁶

NOTE.—See further Arts. 234 and 245. A bill of exchange differs from a note in this. If there be two or more acceptors they can only be liable jointly, not jointly and severally.⁷

Note con-
taining
pledge of
security.

Art. 280. A promissory note may contain a pledge of collateral security with authority to sell or dispose thereof.⁸

NOTE.—Would the right to the security pass with the instrument? The question has been touched on but not decided.⁹ In France the security follows the instrument, *Nouguier*, § 715. The Belgian Commercial Code, § 26, expressly enacts the same as to bills.

Note in
alterna-
tive.

Art. 281. A promissory note may (perhaps) give the holder the option between the payment of the

¹ *Monson v. Drakeley* (1873), 16 Amer. R. 74; Cf. *Ridd v. Moggridge* (1857), 2 H. & N. 568, dub. Pollock, C. B.

² *Byles*, 12th ed. p. 7; *Parsons*, v. 1, p. 247.

³ *Ex parte Buckley* (1845), 14 M. & W. 469.

⁴ *MacLæ v. Sutherland* (1854), 3 E. & B. 1.

⁵ *Penkivell v. Connell* (1850), 5 Exch. 381.

⁶ *Gardner v. Walsh* (1855), 5 E. & B. 83; see Art. 248.

⁷ *Jackson v. Hudson* (1810), 2 Camp. 447.

⁸ *Wise v. Charlton* (1836), 4 A. & E. 786; Cf. *Towne v. Rice* (1877), 122. Massachus. R. 67.

⁹ *Storm v. Stirling* (1854), 3 E. & B. 832.

sum specified and the performance of another act by the maker. As to the latter it is not a note.¹ Note in
alterna-
tive.

NOTE.—So held in America. The question has not been raised here. See Art. 10. As the payee can demand money, and no option is given to the debtor, it is said there is no uncertainty in the instrument. The promise to pay money is absolute. In New York an instrument running "I promise to pay to C. or order 100 dollars, or in goods on demand," was held to be a valid note.²

Art. 282. A promissory note, made by a corporation, may (perhaps) be issued under seal without signature.³ Note
under
seal.

NOTE.—The question turns on the true construction of 3 & 4 Anne, c. 9, § 1. See, too, the language of 25 & 26 Vict. c. 87, § 47, as to the bills and notes of companies under that Act. It is clear that such an instrument may be negotiable for the purpose of passing with a good title to a *bona fide* purchaser for value.⁴ But is it for all purposes a note? Is consideration for its issue and transfer presumed? Can the bearer sue the maker? What is the liability of an indorser and what is the period of limitation? In New York it is held that a promissory note under seal is not negotiable unless issued by government.⁵ When a note signed by the directors of a company is binding on them personally, the addition of the company's seal is immaterial.⁶

Art. 283. A promissory note for less than £20 payable to bearer on demand must be made payable where issued, but may be also payable elsewhere.⁷ Note
under
£20.

Art. 284. A promissory note for less than £5 payable to bearer on demand is (it seems) void. Note
under
£5.

¹ Cf. *Dinsmore v. Duncan* (1874), 57 New York R. 573; New York Draft Code, 1716.

² *Hostater v. Wilson* (1862), 36 Barb. 307; Cf. Art. 10, Expl. 3.

³ *Crouch v. Credit Foncier* (1873), 8 L. R. Q. B. at 382, 383; see *Ex parte City Bank* (1868), 3 L. R. Ch. 758.

⁴ *Ex parte Colborne* (1870), 11 L. R. Eq. 478; *Rumball v. Met. Bank* (1877), 2 Q. B. D. 194.

⁵ *Merrill v. Cole* (1876), 9 Hun. 98, and *Steele v. Oswego Co.* (1836), 15 Wend. 265.

⁶ *Dutton v. Marsh* (1871), 6 L. R. Q. B. 361.

⁷ 7 Geo. 4, c. 6, § 10.

Note
under
£5.

NOTE.—The legislation on the subject is confused, but this seems to be the effect of it. The 48 Geo. 3, c. 88, makes negotiable notes under twenty shillings void. The 17 Geo. 3, c. 30, requires negotiable notes for more than twenty shillings and less than £5 (or on which less than £5 is unpaid), to specify the payee and to conform to other regulations. This Act is suspended by 26 & 27 Vict. c. 105, as to any note "not being a note payable to bearer on demand." The suspension is continued by 42 & 43 Vict. c. 67. The 9 Geo. 4, c. 65, prohibits the issue or negotiation in England of any note for less than £5 payable to bearer on demand which is made or issued or purports to be made or issued "in Scotland or Ireland, or elsewhere out of England." Bank notes for less than £5 have been prohibited in England since 1829 by 7 Geo. 4, c. 6, § 3; for a definition of "bank note," see p. 269.

Transfer.

Statutory
negoti-
ability.

Art. 285. Promissory notes are by statute negotiable "in the same manner as inland bills of exchange are or may be by the custom of merchants."¹

NOTE.—This statute, it seems, is merely declaratory,² therefore, the provisions of Chapter III. apply in their entirety to notes.

Note on
demand
when
overdue.

Art. 286. It is uncertain when a promissory note, payable on demand and not known to have been dishonoured, is to be deemed overdue for the purpose of affecting the holder with equities of which he had no notice when he took it.³ Cf. Art. 285.

ILLUSTRATION.

A note payable on demand with interest to C. or order is indorsed by C. to D. ten years after its date. D. has not taken an overdue note. He holds it free from equities between the maker and C.⁴

¹ 3 & 4 Anne, c. 9, § 1.

² *Goodwin v. Roberts* (1875), 10 L. R. Ex. at 350.

³ Cf. *Cripps v. Davis* (1843), 12 M. & W. at 165, Parke, B.

⁴ *Brooks v. Mitchell* (1841), 9 M. & W. 15.

NOTE.—In America it is well settled that a note on demand is deemed overdue after the lapse of a reasonable time from its date, regard being had to its nature as a continuing security, *e.g.*, a note indorsed eight months after date was held to have been indorsed when overdue, it being proved that all parties resided in the same place.¹ See further Arts. 133, 134, 138, 259.

Duties of Holder.

Art. 287. Presentment for payment is unnecessary to charge the maker of a promissory note, unless by the terms of the instrument presentment is required.²

Note on demand when overdue.

Presentment to charge maker.

ILLUSTRATIONS.

1. B. makes a note payable to C. or order on demand. The holder can sue B. without proving any presentment or demand.³

2. B. makes a note running "On demand I promise to pay C. or order at sight." This note must be presented for payment before the holder can sue B.⁴

Explanation.—When a promissory note is in the body of it made payable at a particular place, presentment at that place is necessary to charge the maker,⁵ but when a place of payment is indicated at the foot of the note, and by way of memorandum only, no presentment is necessary to charge the maker.⁶

¹ *Herrick v. Woolverton* (1870), 41 New York R. 581.

² *Wallon v. Mascall* (1844), 13 M. & W. at 455 and 458, Parke, B. Cf. Art. 172.

³ *Norton v. Ellam* (1837), 2 M. & W. at 464; Cf. *Dodd v. Gill* (1862), 3 F. & F. 261; *Maltby v. Murrels* (1860), 5 H. & N. at 823.

⁴ *Dixon v. Nuttall* (1834), 1 Cr. M. & R. 307. As to the words "at sight" alone, see Art. 18. They mean on demand.

⁵ *Bowes v. Howe* (1813), 5 Taunt. 30, Ex. Ch.; *Tregothick v. Edwin* (1816), 1 Stark. 468, printed memorandum; *Spindler v. Grellet* (1847), 1 Exch. 384, non-negotiable note; *Sands v. Clarke* (1849), 8 C. B. 751; *Vander Donet v. Thellusson* (1849), 8 C. B. 812; *Randall v. Thorn & Co.*, W. N. (1878), p. 150, C. A.

⁶ *Price v. Mitchell* (1815), 4 Camp. 200; *Exon v. Russell* (1816), 4 M. & S. 507; *Williams v. Waring* (1829), 10 B. & C. 2.

ILLUSTRATION.

Present-
ment to
charge
maker.

B. makes a note payable to his own order and signs it ; below his signature are the words "Payable at X. & Co.'s, Bankers London." B. indorses the note in blank. The holder can sue B without proving presentment.¹

Present-
ment to
charge
indorser.

Art. 288. Presentment for payment is necessary in order to charge the indorser of a promissory note.²

Explanation.--When a note is in the body of it made payable at a particular place presentment at that place is necessary in order to charge the indorser,³ but when a place of payment is merely indicated at the foot of the note and by way of memorandum, presentment at that place is sufficient to charge the indorser,⁴ but (perhaps) a presentment to the maker elsewhere also suffices.⁵

Note on
demand.

Art. 289. A promissory note payable on demand must (probably) be presented for payment within a reasonable time in order to charge the indorsers.⁶

Explanation.--Reasonable time is a mixed question of law and fact.⁷ In determining what is a reasonable time regard must be had to the nature of the instrument as a continuing security.⁸

¹ *Masters v. Baretto* (1849), 8 C. B. 433.

² Art. 160 ; Cf. *Gibb v. Mather* (1832), 2 Cr. & J. at 262, 263, Ex. Ch. ; *Britt v. Lavson* (1878), 22 Hun. R. New York 123, joint and several note.

³ *Roche v. Campbell* (1812), 3 Camp. 247 ; Cf. Art. 166.

⁴ *Saunderson v. Judge* (1795), 2 H. Bl. 510 ; Cf. Art. 166.

⁵ Id. ; and Cf. *Masters v. Baretto* (1849), 8 C. B. 433.

⁶ *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. 574, see at 579.

⁷ Id. at 584 ; Cf. Arts. 150 and 195.

⁸ Id. at 579-580 ; Cf. *Serrel v. Derbyshire Ry. Co.* (1850), 9 C. B. at 829.

ILLUSTRATION.

A note payable on demand is indorsed by C. to D. Ten months afterwards it is presented for payment and dishonoured. This may be a reasonable time.¹ Note on demand.

Liabilities of Maker.

Art. 290. The maker of a promissory note is the principal debtor on the instrument.² He engages that he will pay it at maturity according to its tenour.³ Maker's contract.

NOTE.—The maker is sometimes called the drawer, but the primary and absolute liability of the maker of a note must be distinguished from the secondary and conditional liability of the drawer of a bill of exchange.⁴ In general the maker of a note corresponds with the acceptor of a bill of exchange, and the same rules apply to both. A note indorsed by the payee resembles an accepted bill payable to drawer's order and indorsed by the drawer, the payee corresponding with the drawer.⁵ The distinctions that exist between maker and acceptor arise from this. The acceptor is not the creator of a bill, his contract is supplementary while the maker of a note originates the instrument. Hence (a) a note cannot be made conditionally,⁶ while a bill may be accepted conditionally (Art. 39); (b) the statute 1 & 2 Geo. 4, c. 78, § 1, relating to bills accepted payable at a particular place, has no application to notes, which are therefore on the same footing as bills previous to that Act;⁷ (c) maker and payee are immediate parties in direct relation with each other, while acceptor and payee, except in the case of a bill payable to drawer's order, are remote parties.⁸ See also the notes to Arts. 10, 20, 37. —*Damages.* The measure of damages against the maker of a note would be the same as against the acceptor of a bill, as to which see Art. 213. As in the case of a note payable on demand no

¹ *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. 574.

² Cf. *Chartered Bank v. Dickson* (1871), 3 L. R. P. C. at 580, and Art. 272.

³ *Story on Notes*, § 118; *Walton v. Mascall* (1844), 13 M. & W. at 458.

⁴ *Guinnell v. Herbert* (1836), 6 N. & M. 723.

⁵ *Heylyn v. Adamson* (1758), 2 Burr. at 678, Ld. Mansfield.

⁶ Arts. 275 and 10.

⁷ Cf. *Gibb v. Malher* (1832), 2 Cr. & J. at 262, 263; *Emblin v. Dartnell* (1844), 12 M. & W. 840.

⁸ Cf. *Bishop v. Young* (1800), 2 B. & P. at 83, Ld. Eldon.

Maker's demand is necessary (Art. 287) interest as damages, if no contract. demands were made, could it be recovered only from the date of the writ.¹

Maker's Art. 291. The maker of a note payable to order estoppels. by the fact of making it conclusively admits and warrants to a *bond fide* holder the existence of the payee and his *then* capacity to indorse.²

¹ Cf. *Pierce v. Fothergill* (1835), 2 Bing. N. C. 167.

² *Drayton v. Dale* (1823), 2 B. & C. 293; *Lanc v. Kreckle* (1869), 22 Iowa R. 399; Cf. Arts. 139, 212, 216.

CHAPTER XI.

SECURITIES FOR BILLS OF EXCHANGE.

Rights of Drawer.

Art. 292. Apart from special contract (1.) Where goods are sold, to be paid for by buyer's acceptance of seller's draft, and the acceptor fails or dishonours the bill, the lien of the drawer as unpaid vendor thereupon revives, if he has not parted with the possession of the goods or can stop them in transitu; and it is immaterial that the drawer has negotiated the bill.¹

Drawer's
lien as
unpaid
vendor.

(2.) Where an agent buys goods for his principal, and draws on the principal for the price, his rights, in this respect, are the same as those of an ordinary vendor.²

NOTE.—It is essential to distinguish between the sale of goods to the acceptor, where the property in them vests absolutely in him, subject only to the vendor's lien until they reach his possession, and the case of goods which are sent to the acceptor as cover for the bill, where there is a kind of mixed property in the goods, both drawer and acceptor having a defeasible interest therein.³ The rights and duties of a commission merchant who buys for a

¹ *Gunn v. Bolckow, Vaughan, & Co.* (1875), L. R. 10 Ch. 491; Cf. *Ex parte Chalmers* (1873), L. R. 8 Ch. at 292; *Ex parte Lambton* (1875), L. R. 10 Ch. at 415.

² *Ex parte Banner* (1876), 2 Ch. D. at 287, C. A.; Cf. *Ex parte Gomez* (1875), L. R. 10 Ch. at 645.

³ *Id.* See, too, *Ex parte Lambton* (1875), 10 L. R. Ch. at 416.

Drawer's
lien as
unpaid
vendor.

foreign principal are explained by Lord Blackburn in *Ireland v. Livingston*.¹

Rights of Acceptor.

Right or
lien of
acceptor.

Art. 293. (1.) Where the drawer of a bill of exchange remits goods or securities to the drawee as cover for it, and the drawee accepts, he thereby acquires a lien upon or right to the goods or securities.² If the drawee do not accept he has no right to or lien upon the goods and securities.³

ILLUSTRATIONS.

1. A. consigns goods to B., and draws on him for the price. A. sends the bill of lading and bill of exchange to his own agent who forwards them to B., requesting him to accept the bill. If B. do not accept the bill of exchange he cannot retain the bill of lading.⁴

2. A., the principal, sends goods to B., his agent, on the terms that B. is to sell the goods, receiving a commission, and to accept A.'s drafts in proportion to the goods sent, and if the proceeds of the goods do not cover the acceptances in full, A. is to remit the difference. B. accepts for 200*l*. Before the bill matures A., the drawer, fails. B. has a lien on the goods to the extent of 200*l*.⁵

3. A. consigns goods to B. for sale, draws on him for the price, and negotiates the bill of exchange with bill of lading attached. B. accepts the bill, payable on delivery of bill of lading. This operates as a pledge of B.'s interest in the goods to the holder, who becomes, as regards B., a secured creditor.⁶

¹ *Ireland v. Livingston* (1872), 5 L. R. H. L. at 408.

² *Ex parte Brett* (1871), L. R. 6 Ch. at 841; *Ex parte Oriental Bank Corporation* (1874), 30 L. T. 803 L. J.L.; *Re Pary's Patent Co.* (1876), 1 Ch. D. 631; *Lutscher v. Comptoir d'Escompte* (1876), 1 Q. B. D. 709; Cf. *Ex parte Banner* (1876), 2 Ch. D. at 287, C. A.; see, too, *Steel v. Stuart* (1866), L. R. 2 Eq. 84.

³ *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116; see at 133 per Ld. Cairns, and the comment on this case in *Ex parte Banner* (1876), 2 Ch. D. at 288, C. A.; see, too, *Torrance v. Bank of British America* (1873), L. R. 5 P. C. 246.

⁴ *Shepherd v. Harrison* (1871), L. R. 5 H. L. 116.

⁵ *Re Pary's Patent Fabric Co.* (1876), 1 Ch. D. 631; see *passim Ex parte Dickin* (1878), 8 Ch. D. 377.

⁶ *Ex parte Brett* (1871) L. R. 6 Ch. at 841.

NOTE.—Lord Cairns points out in *Banner v. Johnston*,¹ that where a bill is only allowed to be drawn against shipments or against bills of lading, the stipulation is for the assurance and protection of the drawee, and not for the benefit of the holder. In France it seems the property in the goods would pass with the bill. See *Nouguier*, § 715, and Belgian Code, Art. 26.

(2.) If the acceptor fails during the currency of the bill or dishonours it at maturity, his lien upon or right to the goods or securities is thereby determined, and he holds them at the disposition of the drawer.²

ILLUSTRATIONS.

1. A. draws on B., and remits to B. bills of other parties which he holds to provide B. with funds. B. accepts, fails before his acceptance matures, and compounds, paying 5s. in the pound. If B. realizes the bills sent him as cover, A. is entitled to the balance of the proceeds after deducting the actual amount paid by B. on his acceptance.³

2. An agent buys goods for his principal, remits them to him, and draws on him for the price. The principal accepts the bill, but fails before it matures. The property in the goods does not re-vest in the drawer, for the goods are the principal's absolutely.⁴

NOTE.—Where remittances are made to cover bills, and the drawer by a collateral agreement has assigned his rights to a particular holder, the acceptor holds the remittances for the benefit of that holder as equitable assignee.⁵

Rights of Holder.

Art. 294. Where the drawee or acceptor of a bill is indebted to, or has in his hands, funds of the

Bill not
an assign-
ment of
funds.

¹ *Banner v. Johnston* (1871), 5 L. R. H. L. at 174.

² *Tooke v. Hollingworth* (1793), 5 T. R. 215, approved *Ex parte Banner* (1876), 2 Ch. D. at 289, C. A.; *Ex parte Kelly & Co.* (1879), 11 Ch. D. 306, C. A.; *Re Gottenburg Commercial Co.* (1881), 29 W. R. 358, C. A.; Cf. *Ex parte Smart* (1872), 8 L. R. Ch. Ap. at 224.

³ *Ex parte Gomez* (1875), 10 L. R. Ch. 639.

⁴ *Ex parte Banner* (1876), 2 Ch. D. 278, C. A.; see at 289; see also *Banco de Lima v. Anglo-Peruvian Bank* (1878), 8 Ch. D. 160.

⁵ *Ex parte Carrick* (1858), 2 De G. & J. 208.

Bill not
an assign-
ment of
funds.

drawer sufficient to meet it, the bill does not operate as an assignment of the debt or funds in favour of the holder.¹

Such an assignment can only be effected by agreement extraneous and collateral to the bill.²

ILLUSTRATIONS.

1. A., having a fund in B.'s hands, draws on B. a bill for the exact amount of the fund. This does not operate as an assignment of the fund to the payee.³

2. The holder of a bill purchases it on the faith of a verbal representation made by the drawer that funds sufficient to meet it have been remitted to the drawee, that it is drawn against those funds, and that it certainly will be paid. The drawer fails, and the drawee refuses to accept the bill, though he has funds sufficient to meet it. The bill holder is not entitled to those funds, and the drawee is justified in handing them over to the drawer's trustee.⁴

Bill drawn
against
specific
goods.

Art. 295. Subject to Art. 296 (double insolvency), where a bill of exchange is on the face of it expressed to be drawn against specific goods or securities, the holder does not obtain thereby any charge upon the goods or securities if the bill be dishonoured.⁵

Such charge can only be created by agreement collateral to the bill, and in favour of the person with whom the agreement is made.⁶

¹ *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283, bill; *Hopkinson v. Forster* (1874), 19 L. R. Eq. 74, cheque; *Schroeder v. Central Bank* (1876), 34 L. T. N. S. 735, cheque.

² *Thomson v. Simpson* (1870), L. R. 5 Ch. 659; *Citizens Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352; see at 360 and 366.

³ *Shand v. Du Buisson* (1874), 18 L. R. Eq. 283.

⁴ *Citizens Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352.

⁵ *Inman v. Clare* (1858), Johns. R. at 776; *Robey v. Ollier* (1872), 7 L. R. Ch. 695 at 698.

⁶ *Id.*; see *Ex parte Imbert* (1857), 1 De G. & J. 152; *Ex parte Carrick* (1858), 2 De G. & J. 208; *Ranken v. Alfaro* (1877), 5 Ch. D. 786, C. A., where the holder's charge has been upheld, and *Latham v. Chartered Bank* (1874), 17 L. R. Eq. 205, for the construction of a letter of hypothecation.

ILLUSTRATIONS.

1. Under a credit, No. 20, a consignor of cotton is entitled to draw on the consignee "against cotton purchased according to instructions." The consignee accepts a draft expressed to be drawn "against credit, No. 20," receives the cotton, but fails before the bill matures, and dishonours it. The holder has no charge on the cotton.¹

2. A. consigns by ship *Acacia* a cargo to B., and draws a bill on B. running "Pay to my order 100*l.*, which place to account cargo per *Acacia*." B. promises A. to protect the draft. An indorsee has no charge on the cargo if B. refuses to accept the bill.²

3. A. in India sells and ships cotton to B. in England, and draws for the price a bill running "Pay C. or order 1000*l.*, and place the same to account cotton shipments as advised." B. promises the drawer to protect the bill, accepts it, and gets the bills of lading. Before the bill matures, B. fails, and A.'s English house takes it up. The English house has no charge on the cotton.³

Art. 296. Where the estates of two insolvent⁴ parties, both liable to the holder of a bill of exchange,⁵ are administered under the control of a court of justice,⁶ and one of those parties holds goods or securities of the other's⁷ as cover for the bill,⁸ the holder is entitled to have the proceeds of those goods and securities applied in payment of the bill.⁹

Double
insolvency
of parties
liable.

¹ *Banner v. Johnston* (1871), L. R. 5 H. L. 157.

² *Robey v. Ollier* (1872), 7 L. R. Ch. 695.

³ *Ex parte Arbuthnot* (1876), 3 Ch. D. 477, C. A.

⁴ *Hickie's Case* (1867), 4 L. R. Eq. 226.

⁵ *Vaughan v. Halliday* (1874), 9 L. R. Ch. Ap. 561.

⁶ *Powles v. Hargreaves* (1853), 23 L. J. Ch. 1.

⁷ *Ex parte Lambton* (1875), 10 L. R. Ch. Ap. 405; see at 416, 417; *Ex parte Banner* (1876), 2 Ch. D. at 287, C. A.; and see *Banner v. Johnston* (1871), 5 L. R. H. L. at 174.

⁸ *Levi & Co.'s Case* (1869), 7 L. R. Eq. 449; *Ex parte Alliance Bank* (1869), 4 L. R. Ch. Ap. 425.

⁹ *Ex parte Waring* (1815), 19 Ves. 345; *Ex parte Parr* (1818), Buck. 191; *City Bank v. Luckie* (1870), 5 L. R. Ch. Ap. 773; *Bank of Ireland v. Perry* (1871), 7 L. R. Ex. 14; *Ex parte Dewhurst* (1873), 8 L. R. Ch. Ap. 965.

Double
insolvency
of parties
liable.

If the proceeds of the goods and securities do not equal the amount of the bill, the holder is entitled to prove as a creditor for the balance.¹

ILLUSTRATIONS.

1. The drawer and acceptor of a bill both become bankrupt. The acceptor holds short bills belonging to the drawer as cover for his acceptance. The holder is entitled to the proceeds of these bills when realized.²

2. The drawer of a bill becomes bankrupt. The acceptor dies insolvent. By agreement with the acceptor the drawer holds certain goods as security for the amount of the bill. The holder is entitled to the proceeds of these goods.³

3. The drawer and acceptor of a bill become bankrupts. The acceptor accepted under a guarantee from a bank that the drawer should provide funds to meet the bill and keep him out of cash advance. The holder is not entitled to the benefit of the guarantee.⁴

4. The drawer and acceptor of a bill become bankrupt. The acceptor holds securities which were deposited by the drawer as security for his current account, before the bill was drawn, and without reference to it. The holder is not entitled to the benefit of those securities.⁵

5. The drawer and acceptor of a bill, who are distinct firms in India and England respectively, but engaged in a joint adventure, become bankrupt. The bill is drawn specifically against a consignment of goods from the drawer to the acceptor. The holder is entitled to the proceeds of the consignment, subject to claims of the aggregate creditors of the two firms against the aggregate assets.⁶

¹ *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430; see at 452, and form of order at 445, also form of decree in *City Bank v. Luckie* (1870), 5 L. R. Ch. Ap. at 778; *Ex parte Joint Stock Discount Co.* (1875), 10 L. R. Ch. Ap. 198, reduction of proof. Qu. if *Loder's Case*, 6 L. R. Eq. 491, be right?

² *Ex parte Waring* (1815), 19 Ves. 345.

³ *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430.

⁴ *Ex parte Stephens* (1868), L. R. 3 Ch. Ap. 753.

⁵ *Levi & Co.'s Case* (1869), 7 L. R. Eq. 449.

⁶ *Ex parte Deuchurst* (1873), 8 L. R. Ch. Ap. 965; Cf. *Ex parte Manchester Bank* (1879), 12 Ch. D. at 779.

6. The drawer and acceptor of a bill become bankrupt, the double drawer having sold goods to the acceptor and drawn on him for insolvency the price according to agreement. The holder is not entitled to of parties the proceeds of the goods.¹ liable.

NOTE.—The rule stated in this article is generally known as the rule or doctrine of *Ex parte Waring*. It has been much misunderstood. The principle on which it is founded is the necessity of working out the equities between the two insolvent estates, each of which has a claim on the goods or securities forming the cover for the bill, which can only be satisfied by the application of the proceeds to meet the bill. It is not founded on, nor does it imply any property or interest in, the goods or securities on the part of the bill-holder. See per Lord Cranworth, and Turner, L. J.,² per Lord Hatherley,³ per Lord Cairns,⁴ per James, L. J.⁵

Explanation 1.—Each of the insolvent parties must be liable to the bill-holder in respect of the bill transaction, but it is not necessary that both of them should be liable as parties to the bill.⁶

ILLUSTRATIONS.

1. A bill is drawn specifically against a consignment of goods. Drawer and drawee both become bankrupt, and the drawee refuses to accept. The holder is not entitled to the proceeds of the goods.⁷

2. A. in Scotland employs S. as his correspondent at Havannah, and B. as his correspondent in London. A. sends goods to S. and by arrangement between all parties, draws on B. for the price. B. accepts. S. sends remittances in bills to B. to cover his acceptance. S. and B. become bankrupt. A. is entitled to the proceeds of the remittances if he takes up the bill.⁸

¹ *Ex parte Lambton* (1875), 10 L. R. Ch. Ap. 405.

² *Powles v. Hargreaves* (1853), 3 De G. M. & G. at 447, 458.

³ *City Bank v. Luckie* (1870), 5 L. R. Ch. Ap. at 776.

⁴ *Banner v. Johnston* (1871), 5 L. R. H. L. at 174.

⁵ *Vaughan v. Halliday* (1874), 9 L. R. Ch. Ap. at 567.

⁶ *Vaughan v. Halliday* (1874), 9 L. R. Ch. Ap. at 568.

⁷ *Ibid.*

⁸ *Ex parte Smart* (1872), 8 L. R. Ch. Ap. 220.

Double
insolvency
of parties
liable.

Explanation 2.—It is not necessary that the two insolvent estates should be administered in bankruptcy. It is sufficient that they are both administered for the benefit of creditors under the control of a court of justice.¹

NOTE.—It is conceived that where a debtor enters into a composition with his creditors under the Bankruptcy Act, 1869, the estate is sufficiently administered under the control of a court of justice to allow the doctrine of *Ex parte Waring* to apply.² In s. 10 of the Judicature Act, 1875, the bankruptcy rules as to process, &c., are applied to the winding up of insolvent companies and the administration of the estates of persons who have died insolvent.

Rights of Surety on Bill.

Right of
surety
compelled
to pay to
securities.

Art. 297. (1.) Where a bill, which was accepted for value, is dishonoured, and the drawer or an indorser is compelled to pay it, he is entitled to the benefit of any securities deposited by the acceptor with the holder to secure the payment of the bill which the holder had in his possession at the time of the dishonour of the bill.³

NOTE.—When a bill is accepted for value the drawer and indorsers are *quasi* sureties for the acceptor, see Art. 245. See the limits of the relationship discussed by Lord Blackburn and Lord Watson.⁴

¹ *Powles v. Hargreaves* (1853), 3 De G. M. & G. 430 at 451, 458; *Hickies Case* (1867), 4 L. R. Eq. 226; *Ex parte General South American Co.* (1875) 10 L. R. Ch. Ap. 635; *Ex parte Gomez* (1875), 10 L. R. Ch. Ap. at 647, 648.

² Cf. *Ex parte Gomez* (1875), 10 L. R. Ch. Ap. at 648; and see the status of a composition discussed in *Ex parte Rumball*, 6 L. R. Ch. Ap. 842, and *Gray v. Mcgrath* (1874), 9 L. R. C. P. at 230.

³ *Duncan For & Co. v. N. & S. Wales Bank* (1880), 6 App. Cas. 1 H. L. overruling C. A.; see *First National Bank v. Word* (1877), 71 New York R 405.

⁴ *Duncan For & Co. v. N. & S. Wales Bank*, *supra* at pp. 19, 22.

(2.) Where an accommodation party¹ is compelled to pay a bill, he is entitled to the benefit of any securities deposited by the person accommodated with the holder as security for the payment of the bill.²

¹ See Arts. 90 and 229.

² *Becheret v. Lewis* (1872), 7 L. R. C. P. at 377, per Willes, J.; *Gray v. Seckham* (1872), 7 L. R. Ch. 680; Cf. *Pearl v. Deacon* (1857), 1 De G. & J. 461.



APPENDIX.

[1 & 2 GEO. 4, c. 78.]

An Act to regulate Acceptances of Bills of Exchange (1821).

WHEREAS, according to law as hath been adjudged, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance; and whereas a practice hath very generally prevailed among merchants and traders so to accept bills, and the same have, among such persons, been very generally considered as bills generally accepted, and accepted without qualification: and whereas many persons have been and may be much prejudiced and misled by such practice and understanding, and persons accepting bills may relieve themselves from all inconvenience, by giving such notice as hereinafter mentioned of their intention to make only a qualified acceptance thereof; be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the first day of August now next ensuing, if any person shall accept a bill of exchange payable at the house of a banker or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall, in his acceptance, express that he accepts the bill payable at the banker's house or other place only, and not otherwise or elsewhere, such acceptance shall be deemed and taken to be, to all intents and purposes, a qualified

1 & 2
Geo. 4,
c. 78.

Bills
accepted
payable
at a
banker's
or other
place,
deemed a
general ac-
ceptance.
Bills
accepted
payable at

a banker's acceptance of such bill, and the acceptor shall not be liable to pay or other place only, the said bill, except in default of payment when such payment deemed a shall have been first duly demanded at such banker's house or qualified accept- other place.
ance.

[2 & 3 WILL. 4, c. 98.]

An Act for regulating the Protesting for Nonpayment of Bills of Exchange drawn payable at a Place not being the Place of the Residence of the Drawee or Drawees of the same (1831).

2 & 3
Will. 4,
c. 98.

Bills of
exchange
expressed
to be paid
in any
place other
than the
residence
of the
drawee, if
not ac-
cepted on
present-
ment, may
be pro-
tested in
that place,
unless
amount
paid to
the holder.

"Whereas doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange, which on the presentment for acceptance to the drawee or drawees, shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof, and it is expedient to remove such doubts;" be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable, had the same been duly accepted.

[6 & 7 WILL. 4, c. 58.]

An Act for declaring the Law as to the Day on which it is requisite to present for Payment to the Acceptors or Acceptor supra Protest for Honour, or to the Referees or Referee in case of Need, Bills of Exchange which had been dishonoured (1836).

“Whereas bills of exchange are occasionally accepted supra protest for honour or have a reference thereon in case of need ; and whereas doubts have arisen when bills have been protested for want of payment as to the day on which *it is requisite that they should be presented for payment to the acceptors or acceptor* for honour, or to the referees or referee, and it is expedient that such doubts should be removed ;” be it therefore declared and enacted by the king’s most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That it shall not be necessary to present such bills of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which such bills of exchange shall become due ; and that if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place, other than in the city, town, or place where such bill shall be therein made payable, then it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill of exchange shall become due.

6 & 7
Will. 4.
c. 58.

Bills of
exchange
need not
be pre-
sented to
acceptors
for honour
or referees
till the day
following
the day
on which
they be-
come due.

Note.—This Act seems to regard due presentment to the acceptor for honour or referee in case of need as obligatory, but does not specify the consequences of the omission to make such presentment.

Sec. 2. And be it further enacted and declared, that if the day following the day on which such bill of exchange shall become due shall happen to be a Sunday, Good Friday, or Christmas Day, or a day appointed by his Majesty’s proclamation for solemn fast or of thanksgiving, then it shall not be necessary that such bill of

If the fol-
lowing day
be a
Sunday,
&c., then
on the day
following

such Sunday, &c. exchange shall be presented for payment, or be forwarded for such presentment for payment, to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas Day, or solemn fast or day of thanksgiving.

THE MERCANTILE LAW AMENDMENT ACT, 1856.

19 & 20
Vict. c. 97.

(19 & 20 VICT. c. 97.)

Acceptance of a bill, inland or foreign, to be in writing on it, and signed by the acceptor or his agent.

Sec. 6. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December, one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

41 & 42
Vict. c. 13.

Note.—By s. 1 of the Bills of Exchange Act, 1878 (41 & 42 Vict. c. 13), "An acceptance of a bill of exchange is not and shall not be deemed to be insufficient under the provisions of the said statutes by reason only that such acceptance consists merely of the signature of the drawee written on such bill." The statutes referred to are the enactment cited above and the corresponding enactment for Scotland 19 & 20 Vict. c. 60. The Act was passed to override the decision of the Common Pleas Division in *Hindaugh v. Blakey*, (1878), 3 C. P. D. 136.

What are to be deemed "inland bills."

Sec. 7. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to any of them, being part of the dominions of her Majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp duty, if any, which, but for this enactment, would be payable in respect of any such bill or note.

THE COMPANIES ACT, 1862.

(25 & 26 VICT. c. 89.)

25 & 26
Vict. c. 89.

Sec. 47.—A promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf, or on account of the company by any person acting under the authority of the company.

Promissory
notes and
bills of
exchange.

Note.—This section now applies to the bills and notes of all companies under the Companies Acts, 1862 to 1879, including limited banks under the Act of 1879.

See some general remarks on this section in *Ex parte Overend* (1869), 4 L. R. Ch. 472, 473. See also Arts. 50, 51, 67, 68, 76.

Compare the language of the present enactment quoted above, with sec. 43 of the previous Companies Act, 19 & 20 Vict. c. 47. The words "by or on behalf, or in the name of the company" are new.

Sec. 47 does not confer capacity on all companies under the Companies Acts to issue bills and notes. It merely prescribes the mode in which such companies as have the requisite capacity are to exercise it.¹

The following cases illustrate this section :—

1. Note in the form, "We jointly promise to pay on account of the X. Company, Limited, (signed) T. B., J. S., Directors." Held to be the note of the company.²

2. Note in the form, "We, the Directors of the X. Company, Limited, promise to pay," etc. (signed) "J. B., T. S." In the corner is the seal of the company. The directors are personally liable on this note.³

See also Art. 37, Expl. 3, for further illustrations.

¹ *Re Peruvian Railways Co.* (1867), 2 L. R. Ch. 617.

² *Lindus v. Melrose* (1858), 3 H. & N. 177 Ex. Ch. ; approved, *Dutton v. Marsh* (1871), 6 L. R. Q. B. 364 ; Cf. *Alexander v. Sizer* (1869), 4 L. R. Ex. 102.

³ *Dutton v. Marsh* (1871), 6 L. R. Q. B. 361 ; see, too, *Gray v. Raper* (1866), 1 L. R. C. P. 694 ; *Courtauld v. Saunders* (1867), 15 W. R. 906.

STAMP ACT, 1870.

33 & 34
Vict. c. 97.

(33 & 34 VICT. c. 97.)

Facts
affecting
duty to be
truly set
forth.

Sec. 10.—All the facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument, and every person who with intent to defraud her Majesty—

(1.) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth ;

(2.) Being employed in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances, shall forfeit the sum of £10.

Note.—A post dated cheque is valid,¹ but it is conceived that the person who issues it incurs a penalty under this section.

Sum
payable
expressed
in foreign
currency.

Sec. 11.—When an instrument is chargeable with *ad valorem* duty in respect of any money in any foreign or colonial currency such duty shall be calculated on the value of such money in British currency according to the current rate of exchange on the day of the date of the instrument.

When
adhesive
or im-
pressed
stamp to
be used.
Cancella-
tion of
adhesive
stamp.

Sec. 23.—Except when express provision is made to the contrary, all duties are to be denoted by impressed stamps only (Cf. sec. 53).

Sec. 24.—(1). An instrument, the duty upon which is required or permitted by law to be denoted by an adhesive stamp, is not to be deemed *duly stamped*² with an adhesive stamp unless (a) the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, *or unless* (b) *it is otherwise proved* that the stamp appearing on the instrument was affixed thereto at the proper time.

¹ *Gatty v. Fry* (1877), 2 L. R. Ex. D. 265 ; see, too, *Misa v. Currie* (1876), 1 L. R. Ap. Ca. 554, H. L.

² Cf. *Marc v. Roux* (1874), 31 L. T. N. S. 372.

(2). Every person who, being required by law to cancel an adhesive stamp, wilfully neglects or refuses duly and effectually to do so in manner aforesaid shall forfeit the sum of £10. 33 & 34
Vict. c. 97.

Note.—The provisoes to sec. 51 must be read in with this section. It has been ruled that cancellation made with a stamp or die is sufficient, and it seems that the cancellation may be made at any time before verdict, provided it can be made by the proper person.¹

Sec. 45.—The term “banker” means and includes any corporation, society, partnership, and persons, and every individual person carrying on the business of banking in the United Kingdom. Banker
defined.

The term “bank note” means and includes (1) any bill of exchange or promissory note issued by any banker other than the Bank of England for the payment of money not exceeding £100 to the bearer on demand; (2) any bill of exchange or promissory note, so issued which entitles or is intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of money not exceeding £100 on demand, whether the same be so expressed or not, and in whatever form, and by whomsoever such bill or note is drawn or made. Bank note
defined.

Sec. 46.—A bank note issued duly stamped, or issued unstamped, by a banker duly licensed or otherwise authorised to issue unstamped bank notes, may be from time to time re-issued, without being liable to any stamp duty by reason of such re-issuing. Re-issue
of bank
notes.

Sec. 47.—If any banker, not being duly licensed or otherwise authorised to issue unstamped bank notes, issues or causes or permits to be issued any bank note, not being duly stamped, he shall forfeit the sum of £50. Penalty
where
bank note
is un-
stamped.

If any person receives or takes any such bank note in payment or as a security, knowing the same to have been issued unstamped contrary to law, he shall forfeit the sum of £20.

Sec. 48.—The term “bill of exchange” for the purposes of this Act includes also draft, order, *cheque*, and letter of credit, and any document or writing except a bank note (*sec. 45*) entitling or purporting to entitle any person, whether named therein or not, to Bill of
exchange
defined.

¹ *Viale v. Michael* (1874), 30 L. T. N. S. 463.

33 & 34 Vict. c. 97. payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned.

An order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a bill of exchange for the payment of money *on demand*.

An order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also any order for the payment by any person at any time *after* the date thereof of any sum of money, and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf, is to be deemed for the purposes of this Act a bill of exchange for the payment of money *on demand*.

Note.—A reference to Art. 10 shows that many documents require to be stamped as bills of exchange which have none of the other incidents of bills and which are clearly not negotiable instruments. See this section discussed in *Buck v. Robson* (1878), 3 Q. B. D. 686, where *Ex parte Shellard* (1873), 17 L. R. Eq. 109, was disapproved; and see, too, *Fisher v. Calvert* (1879), 27 W. R. 301, M. R. As to bills on demand, see secs. 50, 54. Stamp duties were first imposed on bills and notes by an Act of 1781, the 22 Geo. 3, c. 33. It applied only to inland instruments. Bills and notes drawn abroad were not subjected to stamp duty till 1854. The Stamp Act of that year, the 17 & 18 Vict. c. 83, which introduced adhesive stamps, first imposed the duty on the latter class of instruments.

Promissory note defined. *Sec. 49.*—(1.) The term “promissory note” means and includes any document or writing (except a bank note, *sec. 45*) containing a promise to pay any sum of money.

(2.) A note promising the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, is to be deemed for the purposes of this Act a promissory note for the said sum of money.

Note.—A reference to Arts. 10, 19, shows that many instruments

require to be stamped as promissory notes which have none of the other incidents of promissory notes. 33 & 34
Vict. c. 97.

Sec. 50.—The fixed duty of 1*d.* on a bill of exchange for the payment of money on demand *may* be denoted by an adhesive stamp, which is to be cancelled by the person by whom the bill is signed before he delivers it out of his hands, custody, or power. Cheque or
other
bill on
demand
how
stamped.

Note.—The proviso to sec. 54, enabling the person to whom a bill on demand is presented for payment to stamp it must be read in with the present section. As regards foreign bills payable on demand the practice is for the holder to stamp them before negotiation in England; but it is difficult to see under what provision of the Stamp Act this is sanctioned. Secs. 50 and 54 seem framed with exclusive reference to inland bills, and sec. 51 does not apply to bills of exchange payable on demand.

Sec. 51.—The *ad valorem* duties upon bills of exchange and promissory notes drawn or made out of the United Kingdom *are* to be denoted by adhesive stamps. Foreign
note and
foreign
bill not
payable on
demand
how
stamped.

Every person into whose hands any such bill or note comes in the United Kingdom before it is stamped shall, before he presents for payment or indorses, transfers, or in any manner negotiates,¹ or pays such bill or note, affix thereto a proper adhesive stamp, or proper adhesive stamps of sufficient amount and cancel (Cf. sec. 24) every stamp so affixed thereto.

Provided as follows :

(1.) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder thereof there is affixed thereto an adhesive stamp effectually obliterated and purporting and appearing to be duly cancelled, such stamp shall, so far as relates to such holder, be deemed to be duly cancelled, although it may not appear to have been so affixed or cancelled by the proper person.

(2.) If at the time when any such bill or note comes into the hands of any *bonâ fide* holder thereof there is affixed thereto an adhesive stamp not duly cancelled (Cf. sec. 24) it shall be competent for such holder to cancel such stamp as if he were the person by whom it was affixed, and upon his so doing such bill or note shall be deemed duly stamped, and as valid and available as if the

¹ Cf. *Griffin v. Weatherby* (1868), 3 L. R. Q. B. at 760.

33 & 34 stamp had been duly cancelled by the person by whom it was
 Vict. c. 97. affixed. (Cf. sec. 24 and note.)

But neither of the foregoing provisos is to relieve any person from any penalties incurred by him for not cancelling any adhesive stamp. (Cf. sec. 24.)

Other bills and notes how stamped. *Note.*—The result of the Act is this: 1. Bills of exchange payable on demand, whether inland or foreign, may be stamped with either impressed or adhesive stamps, though of course a foreign bill would not be likely to be on an impressed stamp (secs. 23 and 50). 2. Foreign notes of all kinds and foreign bills of exchange payable otherwise than on demand must be stamped with adhesive stamp (sec. 51). 3. Inland notes of all kinds and inland bills payable otherwise than on demand must be on impressed stamps (sec. 23).

Foreign stamp laws. *Foreign Stamp Laws.*—When a bill, issued abroad, is absolutely void (not merely inadmissible in evidence) where issued, because it is not stamped according to the law of the place of issue, it is perhaps void here,¹ but apart from this our courts do not regard the revenue laws of other countries; and this seems right, as the present Stamp Act requires bills issued abroad to be stamped here and makes no allowance for the foreign stamp.

Bill purporting to be drawn abroad deemed to be so. *Sec. 52.*—A bill of exchange or promissory note purporting to be drawn or made out of the United Kingdom is for the purposes of this Act to be deemed to have been so drawn or made although it may in fact have been drawn or made within the United Kingdom.

Impressed stamp of improper denomination may be rectified. *Sec. 53.*—When a bill of exchange or promissory note had been written on material bearing an impressed stamp of sufficient amount but improper denomination, it may be stamped with the proper stamp on payment of the duty and a penalty of 40s., if the bill or note be not then payable according to its tenour, and of £10 if the same be so payable. Except as aforesaid, no bill of exchange or promissory note shall be stamped with an *impressed* stamp after the execution thereof.

Effect of note or bill *Sec. 54.*—Every person who issues,² indorses, transfers, nego-

¹ *Clegg v. Levy* (1812), 3 Camp. 166; *Bristol v. Sequerville* (1850), 5 Exch. at 270; *Westlake*, § 176; Cf. Arts. 59, 60; *contra Byles*, 12th ed. p. 403.

² Cf. Art. 246, issue defined.

tiates,¹ presents for payment, or pays any bill of exchange or promissory note liable to duty and not being duly stamped shall forfeit the sum of £10, and the person who takes or receives from any other person any such bill or note not being duly stamped,² either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon or to make the same available for any purpose whatever.

Provided that if any bill of exchange for the payment of money on demand, liable only to the duty of 1*d.*, is presented for payment unstamped, the person to whom it is so presented may affix thereto a proper adhesive stamp, and cancel the same as if he had been the drawer of the bill, and may upon so doing pay the sum in the said bill mentioned and charge the duty in account against the person by whom the bill was drawn, or deduct such duty from the said sum, and such bill is so far as respects the duty to be deemed good and valid. But the foregoing proviso is not to relieve any person from any penalty he may have incurred in relation to such bill.

Sec. 55.—When a bill of exchange is drawn in a set according to the custom of merchants, and one of the set is duly stamped, the other or others of the set shall, unless issued or in some manner negotiated³ apart from such duly stamped bill, be exempt from duty, and upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from such lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of such lost or destroyed bill.

Amount of Duty as per Schedule.

	£	s.	d.	
Bill of exchange payable on demand	0	0	1	Amount of duty.
Bill of exchange of any other kind whatsoever, and promissory note of any kind whatsoever drawn or expressed to be payable, or actually paid or indorsed, or in any manner negotiated in the United King-				

¹ Cf. *Griffin v. Weatherby* (1868), 3 L. R. Q. B. at 760.

² Cf. *Marc v. Rouy* (1874), 3 L. T. N. S. 372.

³ Cf. *Griffin v. Weatherby* (1868), 3 L. R. Q. B. at 760.

		£	s.
33 & 34 Vict. c. 97.	dom where the amount or value (Cf. sec. 11) of the money for which the bill or note is drawn or made does not exceed £5	0	0
	Exceeds £5 and does not exceed £10	0	0
	„ 10 „ 25	0	0
	„ 25 „ 50	0	0
	„ 50 „ 75	0	0
	„ 75 „ 100	0	1
	For every £100, and also for any fractional part of £100 of such amount or value	0	1

Bill payable with interest. *Note.*—The fact that a bill is payable with interest does not affect the stamp,¹ e.g., a note for £50 payable with interest at per cent. requires only a 6d. stamp.

Exemptions.

- | | |
|-------------|---|
| Exemptions. | <ol style="list-style-type: none"> (1). Bill or note issued by the Bank of England or Bank of Ireland. (2). Draft or order drawn by any banker in the United Kingdom upon any other banker in the United Kingdom, not payable to bearer or order, and used solely for the purpose of settling or clearing any account between such bankers. (3). Letter written by a banker in the United Kingdom to another banker in the United Kingdom directing the payment of any sum of money, the same not being payable to bearer or to order, and such letter not being sent or delivered to the person to whom payment is to be made, or to any person on his behalf. (4). Letter of credit granted in the United Kingdom authorizing drafts to be drawn out of the United Kingdom payable in the United Kingdom. (5). Draft or order drawn by the accountant-general of the Court of Chancery. (6). Warrant or order for the payment of any annuity granted by the Commissioners for the Reduction of the National Debt, or for the payment of any dividend or interest on any share in the government or parliamentary stocks or funds. |
|-------------|---|

¹ *Prussing v. Ing* (1821), 4 B. & Ald. 204.

- (7). Bill drawn by the lords of the Admiralty, or by any person ^{33 & 34} under their authority upon and payable by the accountant- ^{Vict. c. 97.} general of the navy (Cf. 35 & 36 Vict. c. 20, s. 7).
- (8). Bill drawn upon and payable out of any public account for any pay or allowance of the army or other expenditure connected therewith.
- (9). Coupon, or warrant for interest, attached to and issued with any security.
- (10). Acknowledgment by a banker of the receipt of any bill of exchange or promissory note for the purpose of being presented for acceptance or payment. (See tit. *Receipt*.)
- (11). Receipt written upon a bill of exchange or promissory note duly stamped.

Protest and other Notarial Acts.

Sec. 116.—The duty upon a notarial act and upon the protest ^{Protest,} by a notary public of a bill of exchange or promissory note may be ^{&c., how} denoted by an adhesive stamp, which is to be cancelled by the ^{stamped.} notary.

Where the duty on a bill or note does not exceed 1s., the duty ^{Amount.} on the protest is the same as on the bill or note. In any other case the duty is 1s., and the duty on any notarial act other than a protest is 1s. *See Sched.*

BILLS OF EXCHANGE ACT, 1871.

(34 & 35 VICT. c. 74.)

An Act to abolish Days of Grace in the case of Bills of Exchange and ^{34 & 35} Promissory Notes payable at Sight or on Presentation. ^{Vict. c. 74.}

§ 2. Every bill of exchange or promissory note, drawn after ^{Bills pay-} this act comes into operation and purporting to be payable at ^{able at} sight or on presentation, shall bear the same stamp and shall, for ^{sight or on} presentation to be ^{presentation} all purposes whatsoever, be deemed to be a bill of exchange or ^{payable on} promissory note payable on demand, any law or custom to the ^{demand.} contrary notwithstanding.



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Bill not
an assign-
ment of
funds.

drawer sufficient to meet it, as an assignment of the debt to the holder.¹

Such an assignment can only be payment extraneous and collateral to

ILLUSTRATIONS.

1. A., having a fund in B's hands, draws a bill for the exact amount of the fund. This does not constitute an assignment of the fund to the payee.²

2. The holder of a bill purchases it on the credit of the representation made by the drawer that funds have been remitted to the drawee, that it is drawn on funds, and that it certainly will be paid. The holder, though the drawee refuses to accept the bill, though he has no funds to meet it. The bill holder is not entitled to sue the drawer. The drawee is justified in handing them over to the drawer.

Bill drawn
against
specific
goods.

Art. 295. Subject to Art. 296 (double bill), where a bill of exchange is on the face of it expressed to be drawn against specific goods or securities, the holder does not obtain thereby an assignment upon the goods or securities if the bill is not honoured.⁵

Such charge can only be created by agreement collateral to the bill, and in favour of the party with whom the agreement is made.⁶

¹ *Shand v. Du Buisson* (1874), L. R. 18 Eq. 283, bill; *Hopwood v. Forster* (1874), 19 L. R. Eq. 74, cheque; *Schroeder v. Central Bank* (1874), 34 L. T. N. S. 735, cheque.

² *Thomson v. Simpson* (1870), L. R. 5 Ch. 659; *Citizens Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352; see at 360 and 368.

³ *Shand v. Du Buisson* (1874), 18 L. R. Eq. 283.

⁴ *Citizens Bank of Louisiana v. New Orleans Bank* (1873), L. R. 6 H. L. 352.

⁵ *Inman v. Clare* (1858), Johns. R. at 776; *Robey v. Ollier* (1872), 7 L. R. Ch. 695 at 698.

⁶ *Id.*; see *Ex parte Imbert* (1857), 1 De G. & J. 152; *Ex parte Clavel* (1858), 2 De G. & J. 208; *Ranken v. Alfaro* (1877), 5 Ch. D. 786, C. A.; and the holder's charge has been upheld, and *Latham v. Chartered Bank* (1877), 17 L. R. Eq. 205, for the construction of a letter of hypothecation.

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